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The BANKING LAW JOURNAL

Combined with THE BANKERS MAGAZINE

VOLUME 63 OCTOBER, 1946 NUMBER 10

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Obligations of Other Federal Agencies		39,669,206
State and Municipal Securities		203,342,413
Other Securities		102,372,972
Loans, Discounts, and Bankers' Acceptances		953,063,063
Real Estate Loans and Securities		3,407,292
Customers' Liability for Acceptances		10,083,062
Stock in Federal Reserve Bank		6,600,000
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Other Assets		5,075,410
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Liability on Acceptances and Bills	$ 15,099,747	
Less: Own Acceptances in Portfolio	3,415,969	11,683,778
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Reserves for:		
Unearned Discount and Other Unearned Income		3,562,686
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Dividend		2,325,000
Capital	$ 77,500,000	
Surplus	142,500,000	
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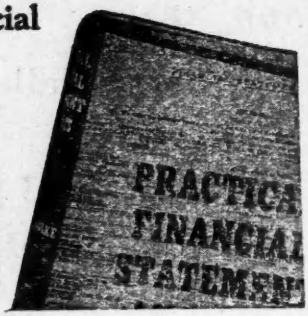

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VOLUME 63 OCTOBER, 1946 NUMBER 10

Major Influences Affecting Mortgage Lending Policy

By ERNEST M. FISHER
Professor of Urban Land Economics, Columbia University

NO KIND of economic enterprise in our country has suffered (or enjoyed) more rapid and fundamental changes in the past fifteen years than has home mortgage lending. So swift and fundamental have these changes been that they have necessitated a complete re-examination of mortgage lending policy. Private lending institutions of every description have been engaged in this re-examination and in the formulation of the principles that should guide them in making mortgage loans on homes.

The task is not yet completed. We have gone far enough to discover that there can be no merit in a permanent lending policy. In previous decades it was not necessary to make frequent adjustments; a policy of lending 50 or 60 per cent on homes in 1900 was still applicable in 1920. Lack of amortization provisions, lack of supervision of the loan, infrequent inspections of the property standing as security, and indifference towards the financial and credit status of the borrower were common in mortgage lending practice.

The events, the repercussions of which have brought these swift and fundamental changes, need not be reviewed here. We may start off with the assumption that mortgage lending is no longer the kind of activity it was in the first three decades of this century. We can state, with almost unanimous agreement, the premise that mortgage lending policy must be flexible in the face of the major influences which determine its appropriateness.

Three Major Influences

These major influences, for the sake of convenience in discussion, may be grouped into three classes; namely, (1) economic and social change, (2) the real estate market, and (3) legislation.

It will be possible in the space

available only to mention the major economic and social changes that affect mortgage lending policy. It must be emphasized, however, that these changes are basic; that they operate with a force that is irresistible; that for the most part they are long-term in character and, therefore, discernible before their impact becomes disruptive.

Among these forces are changes in the population and in its characteristics. The reduction in the size of the family since 1900—particularly in the number of children per family—has been steady and has had far-reaching implications with respect to mortgage lending policy on homes. The old-fashioned home, with the parlor, eight to ten rooms, and the large porch in front, is obsolete. It has been replaced by the cosy bungalow or Cape Cod cottage — compact, convenient, equipped with labor-saving devices, and comprising not more than three bedrooms.

A rising standard of living is another social phenomenon affecting mortgage lending policy. A rising standard of living implies the power on the part of families to command a wider range and a larger number of the products of the farm and of industry. In order to exercise this command, families must have more purchasing power. The choices they make in spending this purchasing power determine the markets for various products and services that constitute the standard of living. When the choice is made in favor of better homes, mortgage lending policy is directly affected; likewise, when other types of commodities and services are chosen, both the volume and the terms of mortgage loans made are involved.

Changes in immigration laws, and internal migrations from rural to urban areas—from one section of the country to another, or from city to city—must be recognized as affecting the decisions that mortgage lenders must make. The whole structure of industrial production, freight rates, wages, and consumer expenditure constitutes a fundamental force that makes mortgage lending policies successful or unsuccessful.

Mortgage Lending Policy Must be Flexible

Mortgage lending policy must also be adapted quickly to changes in the real estate market. Within our own generation we have passed from a stable real estate market into the chaos of World War I, followed by the spectacular boom of the twenties and the catastrophic depression of the thirties into the terror of World War II, and are now in the boom of its aftermath. It is almost too obvious to need statement that no single mortgage lending policy could be pursued through these violent and disparate conditions. Successful mortgage lending policy can be formulated only in the light of an understanding of the

behaviour of the real estate market.

It is a commonplace that this market "never stands on both feet." It passes swiftly from a sellers' to a buyers' market, and just as quickly from a buyers' to a sellers'. Every one recalls almost the exact date when in his community these transitions took place in the twenties, the thirties, and the early forties.

Current events in the real estate market are typical of a boom period. The seller is in the seat. A high price is a small deterrent to a sale. Repeated instances can be cited in which failure to sell at one price was converted into success by raising that price. The pressure on existing real estate facilities is unprecedented. There is grave danger that existing price levels, and possibly further increases in price, may breed the conditions which will lead to collapse of the incipient building boom and the whole real estate price structure.

This situation is in contrast in almost every particular with that which existed in the real estate market from 1930 to about 1940. During that period sellers were at the mercy of buyers, and reductions in price had little effect in tempting potential purchasers. They waited for further reductions. Mortgage funds, now abundant in unprecedented quantity, were—at least in the early thirties—scarce. Interest rates, high at the beginning of the thirties, have gone through a series of reductions until they have reached an all-time low.

Obviously, mortgage lending policy must be adjusted to this major force of the condition of the real estate market. The details will have to be omitted because of limitations of space.

Changes in Legislation

For the main emphasis must be placed here upon changes in legislation as they influence mortgage lending policy.

It is sufficiently dramatic to warrant calling attention to the fact that prior to 1932 no major legislation had been enacted by the Congress of the United States directly affecting mortgage lending policy. Legislation in force prior to that time which influenced mortgage lending policy did so indirectly. It consisted principally of legislation governing the operations of national banks, or revenue-raising measures.

Beginning with the passage of the Home Loan Bank Act of 1932, Congress enacted a number of major measures, and many amendments to those measures prior to 1937, which altogether constitute a body of legislation of major importance to home mortgage lending. These include, in addition to the Home Loan Bank Act, the Home Owners' Loan Corporation Act, which, besides the initiation of rescue operations, provided for the establishment of federally chartered savings and loan associations with the major purpose of financing homes. The

National Housing Act, approved in 1934, set up the Federal Housing Administration and the Federal Savings and Loan Insurance Corporation, both of which have exerted important influences on home mortgage lending policy.

In all of these measures, and in amendments made to them prior to 1937, emphasis is placed upon the traditional principles of sound credit. Certainly, the term of mortgage loans was greatly extended; the loan-value ratio was significantly increased: instead of a term of ten years or less, fifteen and twenty years were boldly accepted; the traditional loan-value ratio of 60 or 66 2/3 per cent was raised to 80. But even the Home Owners' Loan Corporation operations, as events have proved, were designed to be carried on in such a way that the borrower would have a genuine equity to protect the Corporation and a reasonable prospect of discharging his mortgage obligation. The almost universal approbation which this series of measures received grew out of the recognition that they *constituted a realistic adaptation of mortgage credit to the circumstances prevailing in the early thirties.*

In 1937 a new trend became manifest in federal legislation. The argument frequently began to appear that the term of the mortgage loan should be increased from twenty to twenty-five years, and that the loan-value ratio should be further increased from 80 to 90 per cent. The principal reason given was that more potential purchasers could buy with a 10 per cent down payment and with twenty-five years in which to discharge their debt. However, it was pointed out in these arguments that building materials were abundant and building labor idle. In addition, the cost of construction and real estate prices were rising, vacancies were declining, and national income was increasing.

More Liberal Credit

In such a situation, it was argued, there was nothing unsound in extending more liberal credit to the buyers of small homes in the lower-price ranges. For these homes, it was argued, there would always be a market. The cost of occupancy, as an owner, would not exceed the fair rental value of the property even though there were an economic recession or depression. The change was made in 1938, when the Federal Housing Administration was authorized to insure mortgages on new homes appraised at not more than $6,000, in an amount not to exceed 90 per cent of the value of the property and for a term not exceeding twenty-five years. One of the major purposes of this legislation was to stimulate construction of lower-priced homes and to make their purchase possible for those who had neither accumulated a down payment of 20 per cent nor were able to meet the required level monthly pay-

ment to amortize the mortgage in a period of twenty years.

For two years and a half this provision of the National Housing Act was in operation, and under careful administration the loans insured under it proved to be subject to no greater percentage of delinquency than those insured under the original provisions of the Act.

Then came the defense program, followed by the war. Under the pressure of the exigencies of these programs, special provisions were enacted in a new title to the National Housing Act, known as Title VI. This measure was frankly a defense and war housing measure. One of the cardinal features of the previous act was omitted. This was the provision that the Administrator should not insure a mortgage unless he found that "the project with respect to which the mortgage is executed is economically sound." Title VI, as amended in 1942, provides that "no mortgage shall be accepted for insurance . . . unless the Administrator finds that the project with respect to which the mortgage is executed is an acceptable risk in view of the emergency . . ."

No one objected to this provision in the emergency. It may be significant, however, that the principle of economic soundness was repudiated in this amendment.

Veterans Emergency Housing Act

For in the legislation known as the Veterans' Emergency Housing

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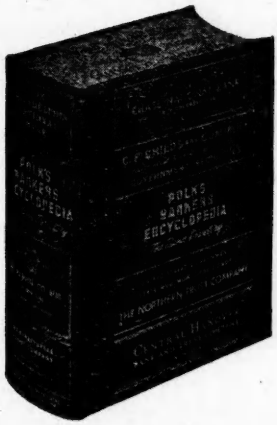

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Act of 1946, this same waiver of economic soundness again appears. Some of the provisions of the General Housing Bill of 1946, known as the Wagner-Ellender-Taft Bill, seem to be based upon the same disregard for economic soundness. For one clause of this bill, as it passed the Senate, provides that under certain circumstances the term of mortgage insured shall be "not to exceed thirty-two years . . . provided that such maturity shall not exceed twenty-five years unless the Administrator is satisfied that the periodic payments required under a mortgage of shorter maturity would be in excess of the mortgagor's reasonable ability to pay . . ." There are other provisions in this bill which seem to be based upon the principle that the amount and terms of the loan are determined by the borrower's need, and not by the likelihood of repayment. This is not the first instance in which this substitution of principle has been made, but it is the first time it has occurred in connection with home financing.

But when the amount and terms of a loan are made to conform to the borrower's need, the lender is no longer able to depend upon repayment. The question of soundness or security of the loan is subordinated and cannot be considered a controlling factor in the transaction.

The lender, who is investing funds which he has obtained from the public and holds as a trustee or fiduciary, cannot be expected to make a loan on such a basis. His primary consideration must be protection of the funds which he loans. This impasse is resolved by the substitution of a government guaranty, in one form or another, so as to remove the risk of loss of funds. In recent and pending legislation, the Federal Housing Administration is used as the instrument for effectuating this guaranty.

Again the device is not new, but the use to which it is put is quite different from the purpose for which it was invented. Whether, as a matter of fact, the fee charged for the guaranty will prove to be a sufficient premium to accumulate the funds necessary to pay losses is anyone's hazardous guess.

Lender Faces Dilemma

The lender of institutional funds faces a terrible dilemma. He must decide whether to make loans on this basis, depending upon the government guaranty, or to refuse to depart from the standards of practice that have been ingrained in institutional lenders since time immemorial. If he chooses the first alternative, he moves in the direction of larger and larger dependence upon governmental participation in his business; if he chooses the latter, he finds it difficult to reconcile his conscience.

Another implication of this legislation is so important as to

necessitate some attention. There is general agreement that the extension of credit plays an important role in the activity of the real estate market. It is not so generally recognized that credit terms have an intimate relationship also to prices in the real estate market. In effect, the extension of credit constitutes an increase in the real estate market. In effect, the extension of credit constitutes an increase in the borrower's purchasing power. A family with $500 to pay down is limited to purchase of a house costing $5,000 if it must make a 10 per cent down payment. If it has to make only a 5 per cent down payment, the price limit is increased to $10,000.

When monthly payment is the limiting factor, the effect of extending the term of the mortgage is in the same direction. When a family is limited to $20 a month for debt service, it can borrow only $2,666 and repay the loan, by level monthly payments, in fifteen years at 4 per cent interest. When the term is extended to thirty-two years, it can borrow $4,292. Thus, when its price limit is fixed by the amount of monthly level payment to debt service, it is enabled to purchase a property costing $1,600 more than it could pay if the term were limited to fifteen years. It is significant that a mortgage lender operating in a residential area recently reported that the cost of homes in his area has risen by $4,000 since the passage of the Servicemen's Readjustment Act of 1944.

The effect of an extension of credit terms in a sellers' market may be largely absorbed by price rises. The tendency may be the same in a buyers' market, but certainly the effect is much less pronounced. It would seem justifiable to conclude that in the present real estate situation the effect of the extension of credit in larger proportions to the purchase price, and over a longer term of years, may be to accentuate rising real estate prices.

There are other features of the General Housing Bill of 1946 of basic importance to mortgage lenders. Limitations of space prohibit adequate discussion of these features. The bill is a 117-page document. It contains eleven titles, five of which embody provisions constituting major policy, and four of which contain subject matter which has never before been considered by the Congress. These four new subjects are:

(1) The consolidation, under the supervision and control of a National Housing Administrator, of the Federal Housing Administration, the Home tion, and the Federal Public Housing Authority. (During the war these agencies have been operating under the general supervision of the National Housing

Administrator, pursuant to the provisions of an Executive order.)

(2) The insurance of guarantee of a minimum return on capital invested in rental housing.

(3) The participation of the Federal Government in losses incurred by local governmental bodies in assembling, clearing and preparing sites in slum, blighted, or outlying areas.

(4) The extension of government loans and other assistance on a major scale in connection with rural housing.

Other titles provide for further extension of existing programs, including those of public housing, of the Federal Housing Administration, and of the Federal Home Loan Bank System and Federal Savings and Loan Associations.

The bill is thus faithfully described as an omnibus bill. It would be difficult to exaggerate the importance of its implications with respect to mortgage financing. It has been strongly supported, and violently attacked. Neither the supporters nor those who have been in opposition have had time before the Committee of the Senate in hearings to analyze the provisions of the bill and their inmplications.

In view of the passage of the Veterans' Emergency Housing Act of 1946, there is some question whether further legislation will be enacted by the present Congress. It would require extensive hearings to enable the Banking and Currency Committee of the House to secure a clear conception of the content of the General Housing Bill of 1946. In view of its importance it seems modest to recommend a careful study on the part of those who are interested in mortgage lending of its major provisions and their implications.

Summary

In summary, the violence and rapidity of the changes that have come in mortgage lending in this country in the past decade and a half are unprecedented in history. The major influences affecting mortgage lending policy have all operated with an intensity previously unexperienced. In no period of comparable length have the social and economic forces affecting mortgage lending policy been so intense and changed with such rapidity. The real estate market has fluctuated with its characteristic amplitude, but at an accelerated pace. Items of federal legislation establishing major policies of the Federal Government have followed one after another.

Never before has the mortgage lending officer been challenged as he is today to adapt policy to major forces affecting it. The pressures are nearly all in the

(Continued on page 804)

BANKING LAW ARTICLES

JOSEPH A. NOBILE
Legal Editor

G. RUDOLPH NOBILE
Assistant Legal Editor

Bank Not Liable to Depositor for Payment on Forged Withdrawal Slip

Where a savings bank makes a payment of the greater part of a savings deposit to one in possession of depositor's passbook on presentation of passbook and a forged withdrawal slip containing depositor's signature, and said payment is made in accordance with rules contained in passbook, it is held that the savings bank is exercising ordinary care in making the payment and is not liable to the depositor for making the payment. This was decided in the case of Watts v. American Security & Trust Co., Municipal Court of Appeals for the District of Columbia, 47 Atl. Rep. (2d) 100. In the instant case a friend of plaintiff's stepson took the passbook from the plaintiff's coat pocket, obtained a withdrawal slip from the bank, forged the signature by tracing a signature from one of the notices taken from plaintiff's briefcase and presented the passbook and slip at the bank and withdrew $900 from plaintiff's account of $1,000 in the defendant bank.

There was evidence that the person who presented passbook and forged withdrawal slip was, according to bank teller's own testimony, a man of about 20 to 22 years of age while the depositor's signature card gave the plaintiff's date of birth as about 40 years of age. It was held that the evidence warranted a finding that defendant bank had exercised reasonable care in making said payment notwithstanding the discrepancy in age of depositor and passer of forged withdrawal slip.

The court in its opinion stated as follows:

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § 469.

Appellant had a $1,000 savings account with appellee bank. His stepson, who lived with him, and two young friends, took the savings pass book; one of the friends forged the depositor's name to a withdrawal slip; and the three of them presented the pass book and forged withdrawal slip to the bank and withdrew $900 from the account. The depositor sued the bank, and upon judgment being awarded against him, brought this appeal.

Two questions are presented: the effect of certain regulations printed in the pass book; and whether a finding by the trial court, sitting without a jury, that the bank exercised reasonable care is supported by substantial evidence.

The relevant part of the Rules and Regulations printed in the pass book follows:

"Every person depositing shall be furnished with a book in which the deposits and payments shall be entered as soon as made. *This book must be presented to the Company whenever a deposit is made or money withdrawn*, that the transaction may be regularly entered therein. Possession of the book of deposit shall be sufficient evidence of ownership thereof to authorize the payment of money, due thereon. The Company will endeavor to prevent fraud on its depositors, yet all payments made by the Company to any person producing the book shall be valid as against the depositor and a full, effectual release thereof to the Company."

The general rule has been approved in this jurisdiction that where a depositor advisedly uses a deposit slip or pass book containing rules with relation to the terms upon which the bank would accept the deposit, he is deemed to have acquiesced therein, and that the provisions are prima facie the contract between the parties.

The appellate courts of the District of Columbia, however, have not had occasion to pass upon the application of this rule to a withdrawal from a savings account on a forged withdrawal slip accompanied by a pass book containing such rules and regulations. The better reasoned decisions in other jurisdictions applying to savings deposits hold that such rules and regulations do not under all circumstances constitute a full release of the bank, but that the bank is bound to exercise ordinary care, or due diligence, in paying out savings deposits, and that what constitutes ordinary care, or due diligence, depends upon the circumstances of each case and is to be determined by the trier of the facts. While this rule was oringally adopted in favor of savings banks, which were mutual in character, it has also been followed with respect to withdrawals from the savings departments of national and commercial banks where similar pass book rules and regulations were in effect. We conclude that the same rule should be applied here.

The depositor, practically conceding this proposition, nevertheless contends that the trial court was wrong in finding that the bank exercised reasonable care. This makes it necessary that we examine the evidence. Briefly stated, it was as follows: Plaintiff was a roofer by trade and an officer of his local union. He kept in a brief case at his home various notices bearing his signature. Three or four months previously he had opened this savings account and had signed a signature card. He had visited the bank only three times and then to make deposits. He kept his pass book in a pocket of a suit, which was hung in a cupboard of his home. He last saw it on a Wednesday preceding the Saturday night he discovered its loss. He reported the loss of the book to the bank early Monday morning and learned that $900 had been withdrawn on the preceding Friday.

Plaintiff's stepson (who at the time of the trial was "doing time" for participating in the forgery) testified at the trial. According to him, one of his friends took the bank book from his stepfather's coat pocket, obtained a withdrawal slip from the bank, forged the signature by tracing a signature from one of the notices taken from the brief case, and presented the pass book and slip at the bank and withdrew $900. The stepson and another young man were also at the bank at the time.

In behalf of the bank, the testimony showed that the teller who handled the transaction had been so employed for six months prior to the withdrawal; that two young men were together at the time; that one of them said something about just having gotten out of the Army and wanting to withdraw some money to have a good time; that the teller checked the signature with the signature card, entered the withdrawal in the pass book and paid out the money. The teller recalled that the young men appeared between 20 and 22 years old and "looked like they worked"; that he did not recall having seen plaintiff before the withdrawal.

The depositor relies strongly on the fact that the signature card also contains the date of his birth, showing him to have been about 40 years old, and urges that ordinary care would have required the teller to note the discrepancies in age and thus become suspicious; that the remark about just getting out of the Army was suspicious in view of the newness of the account.

The questioned withdrawal slip was placed in evidence, together with other samples of the depositor's actual signature. All concerned agreed that the forged signature compared very favorably with the depositor's actual signature, and that there was nothing about the signature itself to arouse suspicion.

Appellee has approximately 55,000 savings depositors. Evidence was introduced showing that in the larger banks in Washington it is

the custom to allow tellers to pay out any amounts from savings accounts when the pass book is presented and when there is nothing about the signature on the withdrawal slip to arouse suspicion. While such a custom could not alter the legal responsibility of the bank, the evidence was admissible as bearing on the question of what would constitute ordinary care.

The case presents an obvious hardship on the depositor faced with the loss of $900 of his savings account. Nevertheless, we would not be justified in holding that the finding of the trial judge that the bank exercised reasonable care was plainly wrong or was not supported by substantial evidence. While under somewhat analogous facts juries have found for the depositor, yet it has been uniformly held that the question of negligence is one for the jury. We may not substitute our judgment on the evidence for that of the trier of the facts.

Appellee has urged the alleged negligence of the depositor (based largely upon his knowledge of the previous bad record of the stepson) as an additional reason why he should not recover. The trial court, however, made no finding on this point, and in view of our conclusion it is unnecessary that we discuss it.

The judgment of the court below is affirmed.

Bank Depositor Cannot Bring Tort Action Against Comptroller for Recovery of "Abandoned Funds"

Where a bank pays over to the Comptroller of New York amount on deposit in pursuance with state statute governing abandoned funds and depositor, a successor trustee of funds of foreclosed railway company, brings action in tort against Comptroller personally, on the theory that the official received property now belonging to him, which he refuses to surrender, and that it constitutes a personal wrong not involving the state, it is held that the depositor has no right of action in tort against the Comptroller. Depositor never had any interest in the assets of bank, and when that bank paid the Comptroller an amount equal to the sum standing to his credit upon its books, it did not surrender any property of depositor.

If Section 127 of the New York Banking Law is unconstitutional, the depositor can sue the bank as its creditor, which

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § 465.

is all original depositor trustee ever was, and the bank would have no defense. If on the other hand, section 127 of aforementioned Banking Law is constitutional, it is because although it extinguished the bank's debt to original depositor trustee, it substituted the right against the "Abandoned Property Fund," (Section 85—State Finance Law) which was "just compensation," and depositor is limited to the remedies provided by said statute. In any aspect, however, the comptroller committed no tort against depositor. This was decided in the case of Studer v. Moore, Comptroller of New York, U. S. Circuit Court of Appeals (2nd Dist.), Vol. 116 New York Law Journal, P. 229. (August 8, 1946)

The substance of the allegations is as follows: The plaintiff is a citizen of New Jersey, the Irving Trust Company is a bank incorporated under the laws of New York, and the defendant Moore is a citizen of New York and the chief fiscal officer of that state, its "Comptroller." On April 4, 1944, the Court of Chancery of New Jersey appointed the plaintiff the sole trustee under a deed of trust for the benefit of holders of first mortgage bonds of a New Jersey railway company, by an order entered in a suit to foreclose the mortgage, begun in March, 1875. On September 12, 1879, the properties of the railroad had been sold in foreclosure, and on June 12, 1880, there remained undistributed about $40,000, which one Coe, then the only surviving trustee, deposited in a bank of the City of New York. On May 4, 1896, there remained of this deposit about $6,000, and at some undisclosed time thereafter, the defendant Irving Trust Company, "by various mergers and consolidations of banks and trust companies became the successor in interest" of the bank in which Coe had deposited the money. On July 16, 1938 "the Irving Trust Company paid over said moneys to the person then acting as Comptroller of the State of New York"; and Moore "now has custody of said moneys." The plaintiff, as Coe's successor, prayed an adjudication that he was the "owner of the moneys, which were on deposit in the Irving Trust Company . . . and which were transferred to the Comptroller of the State of New York."

Section 127 of the New York Banking Law, as it stood on July 16, 1938, provided that on the tenth of each November "every bank and every trust company shall pay over to the state comptroller for the purposes specified in the State Finance Law, all abandoned funds held by it which shall have become abandoned funds on or before the first day of July next preceding . . . No action shall be maintained against any bank or trust company for the recovery of moneys paid over to

the state comptroller pursuant to the purposes of this section." "Abandoned funds" were defined by subdivision 23 of section 2 of the same act to mean "all amounts which for a period of twenty-two years have remained unclaimed by the depositor or creditor entitled to receive the same." Subdivision four of section 5 of the State Finance Law, as amended in 1941, provided that "a claim for any abandoned funds" might be filed with the comptroller by "any person entitled to receive the same"; that the comptroller should pass upon its validity, and that an appeal lay from his decision to the State Supreme Court. Subdivision six of the same section provided that the comptroller should cover into the general treasury any "balance . . . in excess of the aggregate receipts . . . during the ten calendar years next preceding." This last provision was amended before this action was commenced, by section 95 of the State Finance Law, which reserved only a "special fund" of $750,000, known as the "Abandoned Property Fund," and directed the comptroller to cover any excess of "abandoned funds" into the treasury.

Since the plaintiff is the legal successor of Coe, and since by the "various consolidations and mergers" the Irving Trust Company made itself liable to all depositors of the banks with which it had consolidated, or had been merged, it became a debtor to Coe and to the plaintiff, as Coe's successor, except in so far as section 127 of the Banking Law gave it a valid defense. As we understand the plaintiff, he now asserts a cause of action against the comptroller personally on the theory that that official received property, now belonging to him—Coe's deposit—which he refuses to surrender, and that this is a personal wrong which does not involve the state. When a bank pays the comptroller under section 127 of the Banking Law, it will ordinarily do so by means of a credit, through which in turn the comptroller will establish a credit in favor of the "Abandoned Property Fund." Theoretically, it might be possible to treat that credit as property held in trust for all depositors whose credits in the original bank are extinguished by section 127 of the Banking Law; and, indeed, subdivision four of section 85 of the State Finance Law does direct the comptroller to pay depositors out of the fund. We should, however, hesitate long so to construe section 85; and in the absence of contrary interpretation by the state courts we tentatively hold that subdivision four of section 85 creates only a debt against the state, analogous to the depositor's original debt against his bank. The depositor can sue upon that debt only as the state law prescribes, and that law specifically limits him to the state court. The same result would follow, however, even though section 85 gave depositors a proprietary interest in the "Abandoned Property Fund," for any such interest would arise only by fiat of the state law, and the depositor

would be as much limited to the remedies which that law provided as though his claim were only a debt.

However we construe section 85 of the State Finance Law, the District Court had no jurisdiction of the cause of action at bar on the theory that the comptroller had taken over property belonging to the plaintiff which he unlawfully retains in defiance of law, and that this is a tort personal to himself, upon which he may be sued as an individual. True, such an action lies against a tax collector who, by duress, has collected an unlawful tax (Atchison, Topeka & Sante Fe Railway Company v. O'Connor, 223 U. S. 280), and against other state officials for the conversion of property (Tindel v. Wesley, 167 U. S., 204). Great Northern Insurance Co. v. Read (322 U. S., 47) has apparently left this right untouched. But Coe never had any interest in the assets of the Irving Trust Company, and when that bank paid the comptroller an amount equal to the sum standing to his credit upon its books, it did not surrender any property of Coe. Thus the comptroller got nothing which belonged to Coe, and did Coe no wrong in availing himself of the credit so created in his favor. If section 127 of the Banking Law was unconstitutional, things stood as they had; Coe might sue the bank as its creditor, which was all he ever was, and the bank would have no defense. It could not set up its credit to the comptroller as a payment to Coe, nor could Coe follow that credit except as the state law gave him the right to do so. If, on the other hand, section 127 of the Banking Law is constitutional, it is because although it extinguished the bank's debt to Coe, the right against the "Abandoned Property Fund," which section 85 of the State Finance Law substituted, was "just compensation." If so, Coe was limited to the remedies provided by section 85, which did not include an action against the comptroller. In any aspect, therefore, the comptroller committed no tort against Coe, and it is unnecessary to consider how far the state's interest in the "Abandoned Property Fund" may be thought to be that of a sovereign.

Judgment affirmed.

Bank Liable to Depositor for Amount of Check Drawn by Bank Officer on Personal Account

Where an officer of a bank, who engaged in a joint enterprise, a personal, not a bank transaction, with a depositor of the bank, and the officer in settling balance of accounts be-

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § 398.

tween them draws his personal check to depositor who deposits check through the officer, and evidence shows depositor accepted check in good faith and without actual notice or knowledge of any fact which would lead depositor to suspect that check was not good and that the bank officer was embezzling funds of the bank, it is held that the depositor can recover the amount of the check from the bank.

This was decided in the case of Fine v. Harney County National Bank, Supreme Court of Oregon, 170 Pac. Rep. (2d) 865.

In its opinion, the court stated as follows:

In February, 1941, Edward N. Brown was the vice president and assistant cashier of the Harney County National Bank. The plaintiffs J. B. Fine and Ethel Fine are husband and wife, and for a number of years had maintained a joint commercial account with the Bank in which they carried substantial balances. In 1941 J. B. Fine and Brown were engaged in a joint enterprise—a personal, not a bank, transaction—involving the purchase, pasturing and sale of cattle. On February 11 they met at the Bank for the purpose of determining the balance of accounts between them and of effecting a settlement. After some discussion they agreed that the business should be settled by the payment by Brown to Fine of the sum of $7,650. Accordingly, Brown drew his personal check in that amount on his account at the bank payable to Fine, and delivered it to the latter, who immediately endorsed it and handed it back to Brown. Brown thereupon made out original and duplicate deposit tickets showing the deposit of the endorsed check in the bank, gave the duplicate to Fine, and pushed the original under one of the cashier's windows.

This occurred after banking hours about four-thirty in the afternoon, but no point is sought to be made of that circumstance.

Brown was an embezzler of the Bank's funds, and the check he gave was worthless. There is no evidence, however, that Fine knew of his misconduct or of any fact which should excite his suspicion about Brown's check. On August 6, 1942, after the arrival of a national bank examiner at the Bank to examine into its affairs, Brown committed suicide. The Corporation thereafter, as will more fully appear below, purchased certain assets of the Bank and undertook the liquidation of its affairs.

Sometime in March, 1941, Fine called at the Bank for a statement of his account and received what purported to be such a statement from Brown. This document, which is in evidence, is dated

February 17, 1941. The first entry in the balance column shows a balance in the account of $28,573.35 as of January 13. A deposit entry is shown as of February 11 of $7,650, and the balance as of February 17 is $37,655.52. The uncontradicted evidence is that the deposit in controversy was never credited to the plaintiff's account on the books of the Bank; that Brown at no time in 1941 had sufficient funds on deposit in the Bank to cover the check; that it was never charged against his account; and that the false statement was prepared by Brown to deceive Fine.

On the ledger sheet of the Fine account kept by the Bank there appears a deposit entry as of February 28, 1941, in the amount of $7,000. There is in evidence a deposit slip in the name of J. B. Fine and purporting to show a deposit of $7,000 on February 28, 1941, apparently through the medium of a draft in that amount drawn on the First National Bank of Baker. There is no evidence, unless the writing on the deposit slip be considered such, that any such draft was ever issued or paid. It appears in that connection that on February 27 the balance standing to the Fine account on the books of the bank was $3,666.38, and that on February 28 a check for $10,000 drawn on the account by Fine was presented to the bank for payment and was paid. It is a reasonable inference—perhaps the only reasonable one—that Brown made the false deposit entry of $7,000 on the Bank's ledger in order to prevent the creation of a large overdraft in the Fine account which would lead to the discovery of his manipulation of the books and his embezzlements.

A like fictitious deposit entry on May 3, 1941, in the amount of $749.98 appears on the ledger sheet. Immediately prior to this entry the balance in the account had fallen to $9.25, and on May 5 a check for $700 drawn on the account, was paid.

There is also in evidence another purported statement of the Fine account received by Fine from Brown and covering the period from February 21, 1941, to April 14, 1941. On the former date the balance shown by this statement is $30,015.54, and on the latter $19,305.62. As has been seen, the statement delivered to Fine in March disclosed a balance on February 17 of $37,655.52; the two statements, considered together, thus indicating a reduction in the account between February 17 and February 21 of nearly $7,650. As to this Fine testified that he did not withdraw that amount nor any appreciable part of it during that period, and that he did not detect the shortage when looking over his statements. His testimony reveals implicit confidence in the integrity of the Bank and of Brown in particular, and that he paid scant attention to his bank statements and accompanying vouchers. He did not discover the irregularities in the account until after Brown's death.

It is shown by the testimony of John A. Rummel, the national bank examiner who examined the affairs of the institution, that the manipulation of the Fine account had commenced in 1938, and that it was necessary to go back to a time in that year in order of establish a starting point where the ledger sheets of the Bank and the statements issued to Fine were in balance. Rummel went over the account with Fine, and, as a result, "his statement on the bank's ledger was credited with something like $23,000.00 or $24,000.00 and settled satisfactorily between Mr. Fine and myself, and I believe to the Federal Deposit Insurance Corporation, with the exception of this $7,650.00." The witness testified that the corrections in the Fine account were all verified by duplicate deposit tickets which Fine had in his possession with the exception of a deposit ticket for the $7,650 item. Upon this point Fine testified that Brown was accustomed to making out his income tax returns for him. For this purpose he would furnish Brown with his bank statements, vouchers and deposit slips; these were found in the Bank by Rummel and returned to him, except the deposit slip for $7,650. Nor was Brown's check to Fine for that amount ever discovered.

We deem it unnecessary to determine whether the Bank is concluded by the fictitious deposit entries of $7,000 and $749.98 and subsequent withdrawals referred to in the foregoing statement. Under Williams v. Dorrier, 135 Pa. 445, 10 A. 1024, which involves similar facts, it would seem that the Bank would be held estopped to deny want of authority in Brown to place those credits to the depositor's account. We prefer, however, to place our decision upon another ground.

The general rule applicable to a banking transaction such as that with which we are here concerned is thus stated in 2 Morse on Banks and Banking, 6th Ed., 1216, § 569:

"When a check is presented for deposit drawn on the depositary bank, the bank may refuse to pay it, or take it conditionally by express agreement, or by usage, if such a one exists, as in California; but otherwise, if it pays the money, or gives credit to the depositor, the transaction is closed between the bank and the depositor, unless the paper proves not to be genuine, or there is fraud on the part of the depositor. The giving of credit is practically and legally the same as paying the money to the depositor, and receiving the cash again on deposit. The intent of the parties must govern, and presenting a check on the bank, with a pass book in which the receiving teller notes the amount of the check, is sufficient indication of intent to deposit, and to receive as cash. So a credit on the deposit ticket is as significant an act of receiving the check as cash as is a credit on the pass book or the books of the bank."

To the same effect, see 5 Mitchie, Banks and Banking, Perm. Ed., 49, § 26; 7 Am. Jur., Banks, 327, § 457; Oddie v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; Cohen v. First National Bank, 22 Ariz. 394, 198 P. 122, 15 A. L. R. 701, with annotation at pp. 709 et seq.

"The fact that the transaction had not been entered on the books of the bank when the receiver took charge does not affect the situation. The depositor is not required to see that the deposit is entered on the bank's books or that the check is charged to the drawer." 6 Zollmann, Banks and Banking, Perm. Ed., 197, § 3818.

There are cases where, under certain circumstances, such as evidence tending to show that a check was laid aside for examination until the close of banking hours before it should be credited, or evidence of usage that checks were so held (see National Bank v. Burkhardt, 100 U. S. 686, 25 L. Ed. 766), the question whether a check was received for deposit may become one of fact. But we take it that, in the absence of such circumstances or an express agreement that the check is taken conditionally, the question is one of law to be passed on by the court.

Defendants concede the general rule as above stated, but contend that it cannot be applied here because the check, which was the subject matter of the deposit, was Brown's personal check, drawn on his own bank, and given to Fine in payment of his own personal obligation. It is not questioned, and it cannot be, that Brown, as assistant cashier and vice-president of the Bank, was authorized to receive deposits, but it is asserted that when an officer of a bank delivers his personal check for the purpose of paying his personal debt the person taking the check does so at his own risk and without recourse against the bank, and that one who accepts the personal check of an officer of a bank in payment of a personal obligation and seeks to hold the bank thereon has the burden of proving that the officer had the necessary money on deposit to pay such check. In support of these propositions counsel cite nine cases, but upon an examination of them it will be seen that only two, Schwenker v. Parry, 204 Wis. 590, 236 N. W. 652, and Columbia Bank v. Morgan, 198 Wis. 476, 224 N. W. 707, are authority for the rule which defendants would have us adopt.

In the other cases the person dealing with the bank official was informed by the transaction itself that he was using bank funds to pay his personal obligations. In Hier v. Miller, 68 Kan. 258, 75 P. 77, 63 L. R. A. 952; C. M. Condon & Company State Bank v. Richardson, 117 Kan. 695, 232 P. 1070; and Greer v. Farmers' National Bank of Sulphur, 174 Okl. 46, 51 P. 2d 792, the bank officer's debt was attempted to be paid by the issuance of deposit tickets

to the creditor. In First National Bank of Sweetwater, Tex. v. Rust, 5 Cir., 257 F. 29, certiorari denied, 250 U. S. 667, 40 S. Ct. 18, 63 L. Ed. 1197, a certificate of deposit was given. In Bliss v. Live Stock National Bank of Omaha, 122 Neb. 668, 241 N. W. 106, a draft drawn on another bank was used to pay part of the debt and the balance was charged to the account of the officers' own bank with the bank to whom they owed the money. In Holland Banking Company v. Republic National Bank, 328 Mo. 577, 41 S. W. 2d. 815, a draft was drawn on another bank (though in this case the payment was held to be good under a statute). And in State ex rel. Davis v. Farmers State Bank of Hadar, 111 Neb. 585, 197 N. W. 386, three notes belonging to the bank were used to pay the individual notes of its cashier.

In none of the foregoing cases was a personal check of the officer of the bank in any way involved except in Greer v. Farmers' National Bank of Sulphur, supra, and the decision there, against the depositors who were claiming credit for the amount entered on a deposit ticket, was not based on the fact that such a check had been given, but on the following rule which the court quoted from 3 R. C. L. 531:

"If the cashier of a bank, without actual authority so to do, undertakes to pay his individual debts by entering the amount thereof as a credit upon the pass book of his creditor, who keeps an account with the bank, the bank may recover of his creditor the amount of money it may pay out upon checks drawn upon the faith of the unauthorized pass book entries."

The court moreover expressly recognized that if, as some of the evidence showed, the personal check of the officer of the bank had been issued in payment of the debt, the case for the claimants would have been stronger.

The basis of these decisions and of numerous others with similar facts which might be cited is that the person accepting the bank obligation or memorandum of credit is placed on notice that the officer is using bank funds for his private ends. Thus it is said in 4 Zollmann, Banks and Banking, 286, § 2264, in speaking of bank drafts given by an officer of the bank to pay his personal obligation:

"One who accepts such a draft is placed on notice that the cashier is discharging his personal obligation with the funds of the bank and will not be treated as an innocent holder, but may be required to account for the proceeds. Such a draft imparts notice of its infirmities on its very face. The recipient must at his peril determine whether express power exists for such a purpose. This doctrine finds its basis upon that fundamental maxim that "a man cannot serve two masters."

The author continues:

"The same legal consequences follow where a certificate of deposit instead of a draft is issued, or a note of the bank is indorsed to the

creditor of the officer himself, or where the officer gives his debtor a deposit slip, or enters the amount of the debt in the creditor's passbook, or merely promises to deposit the amount for him, and allows him to check against such fictitious credit. The act of the officer places the customer on inquiry, and entitles the bank to recover from him the money thus paid out."

But the text then proceeds:

"A personal check by the officer, of course, is on a different plane. An officer clearly may have a checking account in his own bank, and the fact that he issues checks against it does not impart notice that any fraud is involved, even though his account is overdrawn or nonexistent."

Again it is said, op. cit., 277, § 2262:

"Since it is a general practice of officers and employees of a bank to patronize it with their deposits and checking accounts, a payee, in accepting checks drawn by such officers or agents, is not charged with any notice that they are to be paid out of the funds of the bank or that there is any lack of authority in the drawer to issue them."

The precise question here presented was decided adversely to defendants' contention in Pope v. Ramsey County State Bank, 137 Minn. 46, 162 N. W. 1051, 1052. Lamb, the president of the First State Bank of McIntosh, S. D., gave his personal checks drawn on his own bank in payment of his individual notes to the defendant bank. The checks were paid in the usual manner by an adjustment of accounts with the First National Bank of McIntosh, Lamb acting for his bank in the transaction. He did not have sufficient funds on deposit to cover the checks, which were paid with money of the bank. The defendant bank, however, was without knowledge of this fact. It was assumed for the purpose of the decision that the defendant bank, through its collecting agents, was concluded by the knowledge or notice of its agents that the President of the First State Bank attended to the clearing transactions through which the checks were paid.

In an action brought by the receiver of the First State Bank to recover the proceeds of the checks from the defendant bank, a judgment for the plaintiff, based upon a directed verdict, was reversed. The court said:

"Plaintiff invokes the salutory doctrine that one who receives an obligation of a corporation from the officer or agent who issued it in payment of the latter's personal debt is charged with notice of want of authority in the officer or agent to execute the obligation. The presumption is against the right or authority of an officer or agent of a corporation to execute its obligation for his own use. (Citing

authorities.) All of these cases, and others to which our attention has been directed, relate to obligations of corporations made out by the officer or agent who used them for his personal purposes to the knowledge of those who received them."

The court then pointed out that the personal checks of the president of the First State Bank did not purport to be the obligations of that bank, whereas a cashier's check, a certified check, or a draft are the absolute obligations of the bank issuing them. It was assumed—and justifiably so—that it is a general practice of the officers of a bank to keep checking accounts in their own bank.

"Therefore defendant, in accepting those checks of Lamb, could not be charged with any notice that they were to be paid out of the bank funds, or that there was any lack of authority in the drawer to issue them.

"It will not be questioned, we believe, that one who receives from the president of the Merchants' National Bank in St. Paul a check, drawn on that bank, in payment of the personal note of such president, and obtains the money upon presentation to the paying teller of the bank, cannot thereafter be called upon to refund that money by mere proof that the president's account was overdrawn. Such a transaction would seem to be as legitimate and safe to the person so receiving the money on the check as if he had been paid in currency instead of by check. Here defendant in collecting these checks pursued the ordinary legitimate business course. So did the First National Bank of McIntosh in presenting them for payment and receiving the amount. There was nothing to advise that bank that Lamb's account was overdrawn, or to suggest such a state of affairs. The ones in charge of the State Bank of McIntosh were attending to their duties in the customary way. In the cases hereinbefore cited notice of the corporation's ownership of the funds came from the instrument itself. In the absence of such notice there must be proof that the one who receives the money knows or has reason to believe the same to be a misappropriation. There was no such proof here. The fact that to the knowledge of the First National Bank of McIntosh the State Bank had only Mr. Lamb, his wife, and a bookkeeper in charge of its business, and that Mr. Lamb served both as paying and receiving teller, and adjusted clearings, does not signify."

Counsel for the defendants endeavor to distinguish this case by the statement that one of the principal facts relied on by the court in reaching its decision was that Lamb, some time after he had paid his own checks out of bank funds, made a deposit sufficient in amount to cover all funds which had been withdrawn. In our opinion this is a misconception of the scope and effect of the decision. It is true that at the end of the opinion the court added a paragraph in which it

was said that there was no justice or equity in plaintiff's favor in view of the subsequent deposit. But the case was decided upon the grounds which we have indicated, independently of this circumstance. That this is so is emphasized by a specially concurring opinion of one of the judges, who took issue with the conclusions of the court which we have quoted, but thought that the fact that the moneys had afterwards been deposited by the bank president justified the result.

Aside from the two Wisconsin cases above cited, there are only two other jurisdictions, so far as we are advised, in which the question has been passed upon. In Pemiscot County Bank v. Tower Grove Bank of St. Louis, 204 Mo. App. 441, 461, 233 S. W. 115, the court adopted a view in harmony with that in Pope v. Ramsey County State Bank, supra. First National Bank of High Bridge, N. J. v. Hudson, 166 App. Div. 51, 151 N. Y. S. 595, 598, seems to be to the same effect. See Zollmann, op. cit. 288, note 59.

The Wisconsin decisions refuse to recognize the distinction between an obligation of the bank, given in payment of a bank officer's individual debt, and a personal check on his own bank issued for a like purpose by a bank officer and thereafter cashed by him and hold "on grounds of sound public policy" that a person takes such a check at his peril and without recourse against the bank where there are no funds on deposit to meet it. Schwenker v. Parry, supra, 204 Wis. at page 598, 599, 236 N. W. 652. We are unable to accept the reasoning of the Wisconsin court nor do we find any justification in public policy for the rule which it has adopted. To us the difference between the position of one receiving from the agent of a corporation in payment of the agent's debt an obligation of the corporation, and that of one receiving the agent's personal check drawn on the bank of which he is an officer or employee seems to be obvious and to require nothing further than its statement. In the one case the recipient of the bank's obligation, being advised by that very fact that the bank officer is using the moneys of his principal for his private purposes and not for corporate purposes—that, as the court said in Hier v. Miller, supra, he is trying to serve two masters—has a duty to ascertain whether so unusual an authority has been conferred upon him. In the other case, which is an ordinary business transaction, no such duty arises. As stated in 4 Mitchie, op. cit., 285 § 117, in the course of a discussion of this subject:

"A transaction out of the usual course and showing the antagonistic relations of the bank officer is sufficient to put a third person on notice."

In our opinion, the transaction here in question is not of that kind.

The defendant Bank, therefore, was not entitled to a directed

verdict; while, on the other hand, under the facts in evidence and the rule of law applicable thereto which we deem correct, the plaintiffs were entitled to recover as a matter of law. The proof of those facts was given by the plaintiff J. B. Fine. His testimony is not impeached and his credibility not called in question. Indeed, counsel for the defendants in his argument to the jury, said:

"I have no desire, certainly I have no intention to say, I have no feeling that Mr. Fine is not a fine honest man. I think he has told the truth just as near as human recollection will permit, of the facts. I haven't any reason to doubt that when he said this happened at that particular time, that it did happen."

Notwithstanding this concession by counsel, the court submitted to the jury for their determination the question whether the transaction, as testified to by Fine, had occurred, and their verdict for the plaintiffs conclusively establishes the fact. And, as no claim or suggestion is made that Fine did not accept Brown's check in good faith and without actual notice or knowledge of any fact which would lead him to suspect that the check was not good, the ultimate question here is, in any event, one of law, and must be, as stated, resolved in favor of the plaintiffs.

Upon the question whether the Corporation assumed payment of the deposit liability to the plaintiffs there is evidence of the following facts:

Under date of September 12, 1942, the Corporation executed an instrument, denominated "Power of Attorney," which recites that the Corporation previously "designated Frank Strain Liquidator of the assets purchased by the Corporation under its purchase agreement dated the twenty-ninth day of August, 1942, with The Harney County National Bank of Burns," and, among other things, authorized the said Frank Strain "to sign, seal and deliver as the act and deed of said Corporation, any instrument in writing, and to do every other thing necessary and proper for the collection and recovery by this Corporation of any and all sums, moneys and properties of every kind and nature whatsoever for and on behalf of this Corporation."

While so acting as liquidator Strain prepared a document in which he analyzed the plaintiff's claim and recommended that it be paid. This document he forwarded to the Chicago office of the Corporation about May 25, 1943.

Under date of July 28, 1943, Strain executed as "Agent for Federal Deposit Insurance Corporation" a duly verified proof of amended or supplemental claim in the matter of the estate of Edward N. Brown, deceased, which claim was presented to the executors of that estate, was by them rejected, and was filed in the Circuit Court of the State

of Oregon for Harney County on September 27, 1948. The claim recites:

"This claim is for loses suffered by the Harney County National Bank of Burns, Oregon, by reason of the confessed dishonesty of the decedent while he was employed as an officer of the bank and in the manner set forth in the attached schedules referred to and described as follows:

"Schedule 1—Additional Deposit Liabilities set up by Federal Deposit Insurance Corporation claim agents subsequent to December 31, 1942, in the amount of $17,143.61."

Schedule 1 lists a deposit liability to J. B. Fine in the amount of $7,610.53.

The evidence as to Strain's acts was objected to on the ground that he had no authority to bind the Corporation by the recommendation in question or to allow claims on its behalf. Strain did not testify as to the extent of his authority, but J. F. Angel, senior assistant supervising liquidator of the Corporation, who was called as a witness by the defendants, testified on direct examination that ordinarily the liquidator has nothing to do with deposit claims or with deposit liabilities assumed by the Corporation.

We think that the evidence objected to was properly admitted and that, under the record as made, it established a prima facie case of assumption by the Corporation of the deposit liability in question. While it may not be said that the power of attorney in itself authorized the liquidator to determine the merits of a disputed claim against the Corporation, we think that from the evidence of the witness Angel it could be determined as a fact that Strain was authorized to file the claim against the Brown estate after having submitted his recommendation to the Corporation. Angel testified that he would assume that the action taken was "within his powers," and, under his testimony, viewed in its entirety, we see no reason why the jury might not have made the like assumption.

If this be so, then the inference would be warranted that the Corporation had assumed the Bank's deposit liability to the plaintiffs. The proof of claim against the Brown estate was "for losses suffered by the Harney County National Bank of Burns, Oregon, by reason of the confessed dishonesty of the decedent," and it would not be unreasonable to infer that the assertion of that claim was based upon such assumption.

We conclude therefore, that there was some competent evidence introduced to support the allegations of the complaint against the Corporation, and its motion for a directed verdict was properly denied.

The next assignment of error to be considered is based upon an exception taken by the defendants to an instruction given by the

court. The facts leading up to the giving of this instruction need first to be recited.

On September 29, 1943, the plaintiffs moved the court "for an order requiring the Federal Deposit Insurance Corporation to furnish plaintiffs a copy of the agreement entered into between the Federal Deposit Insurance Corporation and the Harney County National Bank relating to the assumption of the liabilities of the Harney County National Bank by the Federal Deposit Insurance Corporation," and on the same day the court made an order in writing directing "that the defendant Federal Deposit Insurance Corporation furnish unto plaintiffs a copy of all agreements pertaining to the assumption of the liabilities of the defendant Harney County National Bank by the defendant Federal Deposit Insurance Corporation on or before the 5th day of October, 1943." This order was served on Mr. C. B. McConnell, attorney for the defendant Corporation, on September 30, 1943.

On the day of the trial, October 13, 1943, the Corporation, through its attorney, Mr. Robert F. Maguire, who appears to have come into the case shortly prior to that date, produced in court and presented for the inspection of counsel for plaintiffs a certain contract between the Bank and the Corporation, and made certain representations to the court tending to excuse the Corporation's failure to comply with the court's order within the time therein specified. Counsel for the plaintiffs objected to the tender of the document because it came too late, and the court, after listening to discussion by counsel, ruled that the defendant Corporation had been guilty of laches and neglect in its failure to produce the document as ordered.

Upon the trial the court sustained plaintiffs' objection to the admission in evidence of such document when offered by the defendant Corporation, and further sustained plaintiffs' objection to the admission in evidence of another contract between the Bank and The United States National Bank of Portland by which the latter assumed the liabilities of the former. In submitting the case to the jury the court gave the following instruction:

"In this connection however I instruct you that by reason of the failure of the defendant Federal Deposit Insurance Corporation to produce certain documents with relation to liability, that you are to presume the allegation of Paragraph 5 of the Complaint to be true: That is, that the Federal Deposit Insurance Corporation assumed all of the liabilities of the Harney County National Bank, and no proof is to be required for the establishmnet of that allegation."

This, of course, taken with the other instructions, was a direction

to the jury to find against the Corporation if the liability of the Bank should be established.

The statute under which the trial judge purported to act is § 10-401, O.C.L.A.

Nothing in these provisions authorized the court's ruling in the circumstances of this case. Aside from punishment for contempt, the statute provides two penalties for neglect or refusal to obey the order for inspection. One is to exclude the document from being given in evidence, and the other is a direction by the court to the jury to presume the document to be such as the party applying for it alleges it to be, if such document is "wanted as evidence by the party applying therefor." Unless, therefore, it affirmatively appears in the record that plaintiffs wanted the document as evidence the instruction went beyond the power conferred on the court. There is no such showing. A request for an inspection or copy of a document is not tantamount to a request for its use as evidence, and in this case, when the contract was produced prior to the commencement of the trial, counsel for plaintiffs, so far from wanting it as evidence, refused to have anything to do with it and on the trial objected to its admission when offered by the defendant Corporation. It would be an anomalous situation indeed if a party were permitted to object to the admission in evidence of a document in one breath and in the next demand that the jury be instructed that the document is what he alleges it to be because he wanted it as evidence. The anomaly is heightened when, as will be shown to be the case here, it appears from an inspection of the document that its meaning and intent are the antithesis of the instruction. The provisions in question for penalizing the negligent or recalcitrant party are not cumulative but in the alternative, and their obvious intent is that, where the order is not complied with and the document is not made available to the party applying for it and desiring to use it as evidence, then and then only is the court authorized to give such an instruction as was given in this case.

The court is authorized by the statute to direct the jury to presume the book, document or paper to be such as "the party applying" for it "alleges it to be." In this case the only representation as to the character of the agreement is found in the motion for an order of inspection. The complaint itself contains no reference to any such document. In the motion it is referred to as an agreement "relating to the assumption of the liabilities of the Harney County National Bank by the Federal Deposit Insurance Corporation," and it is stated that it "contains evidence or matter relating to the merits of this action." The motion is subscribed by the attorneys for the plaintiffs. It is not sworn to. It is the *party* applying for the document, not

his attorney, who is required to allege the character of the document before the instruction is authorized, and the allegation, we think, must be under oath. "The statute does not expressly provide that it is to be sworn to, nor even that it must be in writing, although the word 'allegation' from the analogy of other judicial proceedings points to that formality": People v. Wyatt, 186 N.Y. 383, 389, 79 N.E. 330, 10 L.R.A., N.S., 159, 9 Ann.Cas. 972. In Nebraska there is a statute almost identical with ours which provides that, if the book, paper or document is "wanted in evidence by the party applying for it, (the court) may direct the jury to presume it to be such as the party by affidavit alleges it to be." In Sallander v. Prairie Life Insurance Co., 110 Neb. 332, 193 N.W. 737, it was held, as stated in the syllabus by the court, that under this statute "the proper practice is for the party desiring to use the book, paper or document in evidence to offer an affidavit setting forth the contents of such book, paper or document. It then becomes the duty of the court to instruct the jury to presume that the contents of the book, paper or document is such as the affidavit alleges it to be." We hold that under our statute, before an instruction of the kind in question may be given, the party applying for the book, paper or document must allege its character in writing under oath. An unsworn motion, subscribed by the party's attorneys, does not, of course, fulfill that requirement, and, even, though it could be said that it did, the recitals in the motion under consideration would not support the instruction given by the court that the jury must presume "that the Federal Deposit Insurance Corporation assumed all of the liabilities of the Harney County National Bank." There is no such allegation in the motion or anywhere else in the record.

The giving of the instruction complained of was reversible error.

Since the case must be remanded for a new trial as to the liability of the Corporation, we deem it unnecessary to inquire whether the court abused its discretion in refusing to accept the excuse offered by the Corporation for its failure to comply strictly with the terms of the court's order and in excluding from evidence, for that reason, the contract between the Corporation and the Bank. The question in that form cannot arise again, and, since the agreement is of the highest relevancy, it should be admitted if offered upon another trial.

A brief consideration of the contract between the Bank and the Corporation and of another contract executed at the same time by the Bank and The United States National Bank of Portland will make it apparent that the case, as tried and submitted to the jury, ignored the realities so far as the question of the Corporation's liability was concerned. For these documents show that while The United States National Bank assumed the deposit liabilities of the defendant Bank,

the Corporation did nothing of the kind—at least it did not do so in the sense that it made itself liable to the plaintiffs or any other depositor.

The contract between the Corporation and the Bank was entered into under date of August 29, 1942, pursuant to authority granted the Corporation by Subsection (n) (4) of § 264, Title 12 U.S.C.A., which provides that the Corporation may "make loans secured in whole or in part by assets of an open or closed insured bank, which loans may be in subordination to the rights of depositors and other creditors, or the Corporation may purchase any such assets or may guarantee any other insured bank against loss by reason of its assuming the liabilities and purchasing the assets of an open or closed insured bank." It recites that the Corporation has determined to purchase all of the assets of the Bank not purchased by The United States National Bank of Portland. The property sold includes "any claims against its (the Bank's) directors, officers or employees or their sureties arising out of any act of any such persons in respect to the Bank or its property or arising out of the non-performance or manner of performance of their duties . . ." It is recited that the agreed value of the assets acquired by The United States National Bank, together with $906,856.47 of what is called the Initial Cash Purchase Price is intended to equal but not exceed the aggregate amount of the liabilities of the Bank to its depositors as shown on an exhibit attached to the contract. But, if the liabilities should be less than that amount, the Bank authorizes The United States National Bank to pay over the difference to the Corporation, such payment to constitute a part of the property sold by the Bank to the Corporation. The Initial Cash Purchase Price consists of (a) $906,856.47 in cash plus (b) "the amount of the liability or liabilities, if any, of the Bank to any depositor or depositors for any reason not included and listed in Schedule 'A' hereto, provided that the Corporation alone and in its sole and absolute discretion shall determine, and such determination by it shall be final, the amount of the liability or liabilities, if any, and the identity of the depositor or depositors of the Bank, if any, not so included and listed in said Schedule 'A'. " In addition to the Initial Cash Purchase Price the Corporation agrees to pay a Further Sum, which, however, is not pertinent to the present inquiry. The contract contains the following paragraph:

"Such contract shall insure solely to the benefit of the Corporation, its legal successors and assigns, and shall be binding upon and inure to the benefit of the Bank, its legal successors and assigns, but shall not be assignable by the bank as a whole or in part without the written consent of the Corporation, and shall not be construed to inure to the benefit of any parties other than the parties hereto."

The contract between The United States National Bank and the defendant Bank contains a recital to the effect that the Corporation has made a commitment to purchase certain assets in order to provide the defendant Bank with sufficient funds to make possible the transfer of certain of its assets to The United States National Bank in consideration of the assumption of its liabilities by the latter to the extent and in the manner thereinafter set forth. In consideration of the transfer of such assets The United States National Bank assumed and agreed to pay liabilities of the defendant Bank aggregating $1,267,449.12. The United States National Bank further agreed to pay, but only upon written certification addressed by the Corporation to the defendant Bank, any deposit liabilities of the defendant Bank not included in a schedule attached to the contract, provided that such liability should not arise until the defendant Bank shall transfer and pay over to The United States National Bank cash or property in an amount equal to such additional liabilities. There is an express provision granting to depositors and creditors the right to enforce the provisions of the contract against The United States National Bank. It is also provided that in the event the amount actually due to the depositors and creditors named in the schedule of liabilities is less than the amount stated in said schedule The United States National Bank agrees to pay the amount of such excess to the Corporation forthwith upon discovery thereof.

In addition to the contracts counsel for the Corporation also offered in evidence a letter dated August 29, 1942, addressed to the Corporation by the defendant Bank and reading as follows:

"The Harney County National Bank has assigned to The United States National Bank of Portland the amount due from your corporation for the purchase of certain assets of this bank in accordance with the contract of this date between this bank and your corporation.

"Accordingly, you are requested to disburse the sum of $906,856.47 representing such purchase price to The United States National Bank of Portland, Portland, Oregon."

The arrangement portrayed by these contracts and the quoted letter was one under which The United States National Bank assumed and agreed to pay all the deposit liabilities of the defendant Bank in consideration of the transfer to the former of certain assets of the latter together with the money which the Corporation agreed to pay for the remaining assets, all of which was intended to equal the total amount of the then ascertained deposit liabilities. If any deposit liabilities should subsequently be asserted and determined by the Corporation to be such the amount thereof would be paid by the Corporation to the Bank as part of the purchase price of the assets sold to

the Corporation. The Corporation expressly stipulated, as it had a right to do, against liability to any third party such as the plaintiffs assert. And, among the assets which it purchased from the defendant Bank were claims against the officers and employees thereof based on their misconduct, a provision which would adequately explain the act of the Corporation in filing a claim against the Brown estate for the amount of the deposit liability to the plaintiffs.

From the foregoing review of the contents of the three documents, the prejudice to the defendant Corporation resulting from the court's refusal to admit them in evidence is obvious. Without the light which they shed upon the case, the evidence that the Corporation filed a claim against the Brown estate for the amount of the deposit liability to the plaintiffs was sufficient, as we have held, to warrant an inference that the Corporation had assumed that liability. But, were the contracts and letter in evidence, an entirely different case would be presented. We, of course, have no means of knowing what character of evidence may be produced on another trial and, therefore, express no opinion as to what the ultimate outcome of the case as to the defendant Corporation may be. Neither do we intimate an opinion as to whether, in the event that the plaintiffs cannot recover in the present case, they may or may not have a remedy in some other form of proceeding by reason of the agreements in question.

In view of our disposition of the controlling questions in the case, we find it unnecessary to discuss any of the remaining assignments of error, except one, which relates to a matter of pleading.

Paragraph V of the complaint alleged in effect that the defendant Corporation took over all the assets of the defendant Bank and assumed all of its liabilities, including its liability to the plaintiffs. By its answer to this paragraph the defendant "denies that it assumed all of the liabilities of the Harney County National Bank of Burns, Oregon, and denies that it assumed liability to pay the plaintiffs the sum of $7650.00, or any other sum whatsoever." On the day of the trial, but before the commencement thereof, counsel for the defendant Corporation tendered to the court, and asked leave to file, an amended answer in which it would have added to the denials above quoted the following:

"Further denies that it took over all or any of the assets of said bank, and denies that it assumed all or any of its liabilities and denies that it assumed any liability of said bank to plaintiffs, and particularly denies that it assumed any liability of said bank to plaintiffs by reason of said alleged deposit of $7650.00, or any part thereof."

The court denied the application, and in its charge to the jury instructed that the denials we have quoted from the answer on which the case was tried were negatives pregnant, which, in effect, admitted that the Corporation took over "any and every portion of the assets

of the bank less than the total liabilities with the exception of the liability to the plaintiffs."

We will not decide whether denial of the application to amend constituted an abuse of discretion. The rule forbidding a negative pregnant is recognized in this state (Minter v. Minter, 80 Or. 369, 157 P. 157), though we think that it "is greatly affected by the liberal rules of construction and amendment of pleadings that prevail generally under the codes," 41 Am.Jur., Pleading, 429, § 196. It is asserted in the plaintiffs' brief in one breath that denial of the application to amend did not prejudice the defendant Corporation, but in the next breath it is argued that the supposed admission of the answer that the Corporation assumed the Bank's liabilities, warranted the court in excluding from the evidence the contracts and letter above discussed which would have demonstrated that those admissions were contrary to the fact. The most that can be said for the court's ruling is that plaintiffs' counsel might have been misled by the form of the pleading and that the application to amend came too late. That will not be the case on another trial, and if the application should be renewed, it should be granted.

The judgment is affirmed as to the defendant Bank, and as to the defendant Corporation it is reversed and the cause remanded for further proceedings in conformity to this opinion.

BANKING DECISIONS

In this department are published each month all of the important decisions of the Federal and State Courts involving questions pertaining to the law of banking and negotiable instruments. The experiences they disclose deserve careful attention and study of bankers, bank counsel, the depositor and the bank student seeking advancement.

Bank Cannot Recover Payment Made by Error on Depositor's Check Where Account Has Insufficient Funds

First National Bank of Portland v. Noble, Supreme Court of Oregon, 168 Pac. Rep. (2d) 354

In the absence of fraud on the part of the holder, the payment of a check by a bank is regarded as a finality, and the fact that the drawer has not sufficient funds on deposit will not give the bank any remedy against the holder.

A mistake in regard to the amount of a customer's deposit is not such a mistake of fact as entitles a bank paying a check to recover back the amount from the payee. Such transaction is not a mistake of fact in a legal sense, only laches. Banks are supposed to be informed of a depositor's financial standing and to know the condition of his account with them at the time of presentation of checks for payment. They are required, and for their own safety are compelled, to know at all times the balance to the credit of each individual customer, and they accept and pay checks at their own risk and peril.

If from negligence or inattention to their own affairs banks improvidently pay when the account of a customer is not in a condition to warrant it, and if by mistake a check is paid when the drawer has no funds, the bank must look to the customer for rectification, not to the party to whom the check was paid.

The facts showed that one K, having only $200 to the credit of his account, drew his check on plaintiff bank in favor of defendants for $10,573.50. Defendants deposited the check, for collection, to the credit of the joint account they had as husband and wife with a bank. Because of insufficient funds, plaintiff bank refused payment. Two days later, defendants' bank presented the check to the (drawee) plaintiff bank, by messenger. A teller, mistaking a rejection symbol "N. S. F." previously made on the check for a symbol of approval,

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition § 1210.

issued a cashier's check in payment. Defendants' bank which had charged back the check to the defendants' account when payment was refused, recredited the account and mailed the defendants an advice of credit. The cashier's check was cleared through the clearing house. Plaintiff bank made timely demand for a refund of the credit thus procured, which was refused. Thereupon plaintiff bank brought the present suit against the defendants and defendants' bank to recover the amount of the cashier's check as money paid under a mistake of fact. The defendants' bank interpleaded the defendants and plaintiff bank, and paid the money into court.

It was held that plaintiff bank was negligent. The teller of the bank acted in reliance on a symbol "N. S. F." which he had never before seen and the meaning of which he had no reason to know. An inquiry would have informed him of its meaning and the status of K's account. But no inquiry was made. The teller's conduct closely approximated that of one who intentionally neglected to investigate the facts.

The defendants were not chargeable with any neglect or inequitable conduct. Neither they nor their collecting agent knew or were entitled to know the state of K's account, and the fact that K's check was marked "N. S. F." on September 22 did not render it unconscionable to present it again on September 24. The defendants were entitled to recover the sum of $10,573.50 paid into the court by the defendants' bank.

Appeal from Circuit Court, Multnomah County; Martin W. Hawkins, Judge.

The plaintiff First National Bank of Portland (Oregon) instituted this proceeding as an action in assumpsit against the defendants Lillian S. Noble and John C. Noble and the United States National Bank of Portland (Oregon). Plaintiff seeks restitution in the sum of $10,573.50, the amount of a cashier's check issued by the First National to the U. S. National. The U. S. National filed a bill in interpleader alleging that it was disinterested as between the parties and tendering the money into court. The interpleader was allowed and an order entered discharging the U. S. National of all liability. By assent of the parties, the case was tried below as a suit in equity. The plaintiff prevailed against the defendants Noble who appeal.

Reversed as to First National Bank, affirmed as to United States National Bank.

H. B. Beckett, of Portland (Wilbur, Beckett, Oppenheimer, Mautz & Souther and R. K. Powell, all of Portland, on the brief), for appellants.

R. R. Bullivant, of Portland (Pendergrass, Spackman & Bullivant and C. E. Wright, all of Portland, on the brief), for respondent First Nat. Bank of Portland.

Wilber Henderson, of Portland (Platt, Henderson, Warner, Cram & Dickinson, of Portland, on the brief), for respondent United States Nat. Bank of Portland.

BRAND, J.—John C. and Lillian S. Noble had purchased certain property from T. D. Lee through Kelleck, a broker. Subsequently by written agreement the sale was rescinded. In accordance with the agreement, the property was reconveyed. Mrs. Noble paid T. D. Lee $693.49 in adjustment of items which had arisen while the Nobles were in possession of the property and before the rescission; and E. C. Kelleck, who did business as the West Coast Brokerage Company, on September 21, drew and issued a check for $10,573.50 on the drawee First National Bank, payable to Lillian S. Noble to whom it was delivered. The Nobles received the Kelleck check in good faith and for value. Before noon of the same day, Mrs. Noble indorsed the check in blank and deposited it in the U. S. National Bank. Twenty-five hundred dollars was deposited in their joint checking account, the balance in their joint savings account. These deposits appear as credits to the Nobles in the ledger and savings pass book, respectively, under date of September 21.

The rules printed in the savings pass book and on the commercial deposit slip were substantially the same. They provide that checks and drafts are credited conditionally—may be charged back "if not found good"— and that the bank will be liable only where actual funds or solvent credits come into its possession.

On September 21 the U. S. National placed its clearing house indorsement on the back of the Kelleck check, but according to custom the stamp was dated September 22, the day for final settlement through the clearing house. The Kelleck check reached the First National on September 22. Reference to the Kelleck account disclosed that he had a credit of only $200. The check, therefore, was referred to Mr. T. D. Peters, assistant cashier of the First National. Peters placed on the lower left hand corner of the face of the check a small symbol, the meaning of which was known only to himself and to certain persons in the bookkeeping department and which indicated that the check was to be rejected for want of sufficient funds. The First National's bookkeeping department then sent the check back through the clearing house to the U. S. National with advice to the effect that it was rejected because of insufficient funds in the Kelleck account. On receipt of the rejected check, the U. S. National mailed to Mrs. Noble at her home address, Oswego, Oregon, advice dated September 23 informing her that the Kelleck check was "being held" because N. S. F. and that the amount was being charged to the Nobles' savings account. The Nobles had left for California at 8 a. m. on September 22 and did not receive the notice until their return in October.

When the Kelleck check first went through the clearing house, the U. S. National received a credit against the First National. When the

Kelleck check was sent back to the U. S. National through the clearing house, the credit to the U. S. National was cancelled. The Kelleck check was returned to the U. S. National prior to 11 a. m. on September 23. The bank then placed upon the check its stamp cancelling the clearing house indorsement previously placed thereon. On Friday, September 24, shortly before 3 p. m., the U. S. National presented the check by messenger to the Collection and Exchange Department of the First National. This was done because the U. S. National desired final payment. Mr. Bohlman, a teller in that department, observed from the condition thereof that the check had previously been rejected. He also observed the symbol which Mr. Peters of the First National had placed on the face of the check. Bohlman mistook the rejection symbol, which he had never seen before, for a symbol authorizing payment. Acting upon his mistaken assumption, he prepared a cashier's check dated September 24, payable to the U. S. National in the amount of the Kelleck check. The First National placed upon the back of the Kelleck check a stamp as follows:

Paid Through Clearing House
Pay to the Order of
Any Bank, Banker or Trust Co.
Sep. 25 '43 9900
Prior Endorsements Guaranteed
The First National Bank of Portland
24-4 Portland, Oregon 24-4

At the same time that Bohlman prepared the cashier's check, he also prepared a blank entitled "Application for Exchange." That instrument is dated September 24, 1943. Upon the face of the application, the following appears:

Cashier's Check [v]
Funds Received
Check on 24-4
Order of 24-11
Purchased by 24-11
534796
Total 10,573.50

24-11 is the number of the U. S. National. 24-4 is the number of the First National. 534796 is the number of the cashier's check which Bohlman prepared. The application for exchange is initialed by Bohlman and was signed by Margaret Berhorst, the messenger of the U. S. National. In pencil and written across the face of the application for exchange are the words "Check has been paid." The application for exchange also bears a stamp: "10 1st of P 56" and underneath "111."

The testimony indicates that the words "Check has been paid" were not placed on the application for exchange by Bohlman, but by some other person in the First National Bank at a later time. Bohlman then delivered the cashier's check, together with the Kelleck check to Metschan, pro-assistant cashier of the First National, who signed the cashier's check. At the request of Bohlman, the messenger of the U. S. National placed upon the Kelleck check the stamp of the U. S. National which reads

"United States National Bank
PAID
12
Portland, Oregon"

The cashier's check was then delivered to the messenger who returned with it to the U. S. National. On its back it bears the indorsement "Credited to account of Mrs. John C. Noble, The United States National Bank, Portland, Oregon," and also the clearing house stamp of the U. S. National which reads "Pay through Clearing House. 11 Sept. 25, 1943." The check is perforated:

"24 PD 4
9 24 43."

The perforation by the First National occurred after the cashier's check had been returned by the U. S. National to the First National. The First National retained the Kelleck check. The U. S. National under date of September 24 mailed to Mrs. Noble at her Oswego address an advice of credit which contains provisions on its face similar to those on the deposit slips and savings pass book already mentioned.

On Saturday, September 25, the Kelleck check, which had been left with Bohlman of the First National, reached the bookkeeping department of that bank. It was tendered with other rejected items to the U. S. National which refused to take it. Shortly after 12 o'clock noon of that day, Mr. Moore of the First National learned of the refusal of the U. S. National to receive the Kelleck check and of the issuance of the cashier's check and that it had been presented for collection through the clearing house at 8:45 a. m., September 25.

There is some question as to when the cashier's check actually first reached the First National Bank; but the testimony of Charles W. McCarty, manager of the Savings Department of the U. S. National, indicates that the check actually left the U. S. National on the 24th and that it is the practice for the clearing house stamp to bear the date of the following day. It will also be recalled that the perforation placed upon the cashier's check, indicating that it had been paid, bears date of September 24. It was believed by one witness, Moore of the First National,

that the perforation date as of September 24 was in error, and that it was in fact perforated on September 25. Other testimony indicates that the cashier's check probably did not physically go through the hands of the clearing house but was delivered directly to the First National on September 24. The lists of checks which were directly exchanged by the banks did, however, go to the clearing house, and the settlements were made at 8:45 a. m., September 25, just as if the checks had been physically presented through the clearing house. We think it likely, therefore, that the cashier's check was received by the First National on September 24 and was perforated "paid" on that date, though the clearing house transaction took place the next morning.

Upon his discovery of the issuance of the cashier's check, Mr. Moore immediately called Kelleck, who stated that he would make a deposit on Monday, the 27th, to cover the Kelleck check. Moore then called the U. S. National by telephone and informed Charles Winkel, the chief clerk, of the situation. Winkel refused "to accept the check back as a returned item" but agreed to "flag" the Noble account.

On Monday, September 27th, Kelleck called Mr. Moore at the First National and stated his inability to cover his check at that time and that the matter could not be cleared up until the return of the Nobles from California. On the same day Mr. Moore and Mr. Bohlman called on Mr. Arnold of the U. S. National. Arnold informed them they could not again charge the Nobles' account because they did not have the Nobles' permission to do so. The First National demanded a refund of the cashier's check. Arnold of the U. S. National explained to Moore of the First National that, since they had received the cashier's check in payment of the item on Friday afternoon, he did not want to refund it without referring to the bank's attorneys. On September 28 the U. S. National advised the First National that the matter was being so referred.

Two other exhibits require comment at this point. The First National Bank's ledger sheet of the West Coast Brokerage Company (Kelleck) shows a balance on September 21, 1943, of $1,000; on September 22, 1943, after withdrawal of $800, a balance of $200. Opposite date of September 24, 1943, there appears an entry in red ink, "$10,373.50, O. D." There is also in evidence a copy of an advice of charge, the original of which was sent to West Coast Brokerage Company. It reads in part "This is to advise you that we have this day charged your account in this bank $10,573.50 as follows: Check No. 2528, dated 9-21-43 to Lillian S. Noble paid by mistake." It is dated "9-24-1943."

It appears from the testimony of Mr. Zollinger, vice-president of the First National, that neither the entry of overdraft nor the advice of charge was made out on September 24 as dated. For reasons later

explained both instruments were prepared some time after October 18, but were dated September 24 as indicated on the exhibits. The Kelleck check now stands as an overdraft on the books of the First National.

We will first consider whether, as claimed by the defendants, issuance and delivery by the First National of its cashier's check constituted, under the circumstances, unconditional payment of the Kelleck check.

The complaint states a purported cause of action in assumpsit on the theory that money was actually paid to the defendants by mistake. It recites that the payment was made under mistake of fact, and that plaintiff requested a refund of said sum. After the filing of the bill of interpleader, the plaintiff filed a reply and "amended counterclaim against the defendants and appellants, Lillian S. and John C. Noble," wherein it seeks to modify the theory by alleging that the U. S. National received a "provisional credit" in the amount of the cashier's check and gave the Nobles a "provisional credit" therefor. But in the so-called reply and counterclaim, the plaintiff alleges that the U. S. National presented the Kelleck check as a "collection item" and the cashier's check was given in exchange therefor and that the First National demanded "a refund of the cashier's check," and prays for judgment in the alternative against the fund in the custody of the court or against defendants. Counsel for the plaintiff asserts that the initial proceedings were superseded by the reply and counterclaim. But a reply does not supersede a complaint, and counterclaims are pleas of defendants and not of plaintiffs. The original complaint was introduced in evidence, but its introduction was unnecessary for it remained as an operative pleading throughout the trial and is of some significance in ascertaining the actual understanding of the plaintiff as to the nature of the transaction, notwithstanding the shift in theory which appears in the reply. Furthermore, in an action in assumpsit for money had and received, it appears to be essential that the plaintiff should show that the defendant received either money or something which was treated by the parties as money.

In Wagner v. United States National Bank, 63 Or. 299, 127 P. 778, 42 L.R.A., N.S., 1135, the defendant issued a check on a drawee bank, payable to the defendant bank in payment of a debt of 67c. Owing to the form in which the check was drawn, the defendant bank received credit in the amount of $67 through a clearing transaction between the defendant and the drawee bank. The plaintiff sued to recover the amount in which the check exceeded the amount of the debt. This court said: "We think, however, it is not necessary for the plaintiff to show that the money to which he had title, like he had to his horse or cow, was received by the defendant to sustain this cause of action. It is sufficient if he show that by any process, which was treated by the parties

as a money transaction, the defendant has received money or its equivalent which, in equity and good conscience, belongs to and should be paid to the plaintiff . . ." Wagner v. United States Nat. Bank, 63 Or. 299, 302, 127 P. 778, 779, 42 L.R.A.,N.S., 1135.

When a debtor gives his own check or promissory note to a creditor, prima facie the transaction is conditional payment only. But even in such a case the ultimate question is one of intention of the parties to the transaction. Smith v. Mills, 112 Or. 496, 503, 230 P. 350. The mutual intention of the parties that a check shall be given and received as payment may be established by proof either of an express contract or a contract implied in fact. Joppa v. Clark Commission Co., 132 Or. 21, 28, 281 P. 834; Riner v. Southwestern Surety Ins. Co., 85 Or. 293, 300, 165 P. 684, 166 P. 952; 48 C.J., Payment § 51, p. 619. If the check of a debtor may, when so understood, constitute payment, a stronger case for final payment would be made out where the debtor's check is presented to the drawee bank and exchanged for the cashier's check of the drawee bank, the original check being marked paid and surrendered. This is especially true in view of the fact that cashier's checks ordinarily pass current as money in everyday business transactions, Riverside Bank v. First Nat. Bank, 2 Cir., 74 F. 276; Johnson v. First State Bank, 144 Minn. 363 175 N. W. 612, 9 A.L.R. 960; Wachtel v. Rosen, 249 N.Y. 386, 164 N.E. 326, 62 A.L.R. 374; 7 Am.Jur., Banks § 525, p. 379; see Merchants' Bank v. State Bank, 10 Wall. 604, 19 L.Ed. 1008; First Nat. Bank of Brewster v. Commercial Bank & Trust Co., 137 Wash. 335, 242 P. 356; and in view of the further fact that the right of countermand applied to ordinary checks does not exist as to a cashier's check. Pines v. United States, 8 Cir., 123 F.2d 825; Polotsky v. Artisans Savings Bank, 7 W.W.Harr. 151, 37 Del. 151, 188 A. 63, 107 A.L.R. 1458.

The following is a brief summation of the evidence tending to indicate that the cashier's check in the case at bar was given, received and dealt with by the parties as final payment.

The application for exchange, prepared by the First National and signed by the messenger of the U. S. National under date of September 24, shows the cashier's check to be "purchased" by the U. S. National. The Kelleck check on the First National records appears as "funds received." Some representative of the First National wrote on the application "Check has been paid." The First National required the messenger of the U. S. National to stamp the Kelleck check paid. The cashier's check of the First National bears its perforation "24 PD 4 9-24-43." The cashier's check was endorsed by the U. S. National "credited to the account of Mrs. John C. Noble," and, according to the allegations of plaintiff's complaint, still remains a credit to her account, which is admitted by the Nobles. In October the First Na-

tional entered in red ink on Kelleck's ledger sheet under date of September 24, the amount of the Kelleck check, and the letters "O. D." meaning overdraft, and sent Kelleck a notice of charge to the same effect and bearing the same date.

Arnold of the U. S. National testified that the direct presentation by messenger was made "because the bank was anxious of securing a final payment." On September 27 Mr. Zollinger, vice-president of the First National, wrote a letter to the U. S. National in which he said:

"On September 22, you presented for payment a check drawn on us by West Coast Brokerage Company payable to Lillian S. Noble and endorsed by her and by you. This check was dishonored when presented for want of sufficient funds.

"On September 24, check was again presented and on this occasion it was honored by mistake and we issued our cashier's check No. 534796 in the amount of $10,573.50 in payment. Our cashier's check bears your endorsement 'credited to account of Mrs. John G. Noble.' "

Concerning a telephone conversation with Moore of the First National on September 25, Winkel, the chief clerk of the U. S. National, testified as follows: "He informed me that they had issued a cashier's check in payment of a check of one of our depositors, and they had found out that there was not sufficient funds in their customer's account to cover the cashier's check for it. I knew nothing, of course, of the transaction at that time. My conversation with him was that inasmuch as they had issued a cashier's check, I would be unable to accept the check back as a returned item because we considered that as final payment, but I would flag the account . . ."

Concerning the red ink "O. D." entry on the Kelleck ledger sheet, Mr. Peters of the First National testified as follows:

"Q. Mr. Peters, why would there be an entry in the ledger that there is an overdraft; what could have transpired to bring about an entry of that kind in the ledger

"Q. Let me put it to you direct: had the Bank paid out that amount of money? A. Evidently so. . . .

"Q. Does that correctly reflect the records of the First National Bank, Mr. Peters? A. If this is the original, it does.

"Q. Your counsel has stated it is the original, I believe. It has been produced here. A. That is all right. . . .

"Q. Then if we assume it is the original ledger sheet of the First National Bank, then the First National Bank had paid out sufficient money to make an overdraft against this man's account in the amount of $10,373.50, is that correct? A. That is correct. . . .

"Q. Mr. Peters, where you turn down a check for insufficient funds, as you did the Kelleck check, you send it back through the clearings, don't you? A. That is right.

"Q. And under those circumstances you don't charge the customer's account do you? A. No, if it is charged back. . . .

"Q. What is it? A. Not if it is returned.

"Q. Not if it is returned. So that this charge against the customer's account here on this Exhibit 20 showing this overdraft of $10,373.50 was entered only after the First National Bank had issued its cashier's check in payment of the Kelleck check, isn't that correct. A. That is right."

Concerning the fact that the Kelleck check was presented by messenger, Mr. Bohlman of the First National testified:

"A. The only significance that I attached to that was the U. S. National Bank was attempting to get payment of that item.
"Q. You understood then that was the purpose? A. They were making a further attempt to collect the money."

Moore of the First National, in explaining why the red ink entry was dated back, testified: "It was dated back to September 24 to appear on our books as of the date of the Kelleck check was actually paid."

The presentation of the cashier's check through the clearing house, according to witness Moore, resulted in a credit to the U. S. National and a debit to the clearing house balance of the First National, and that debit has never been restored or made good. Again Moore testified:

"Q. And the purpose of presenting a check like this by messenger in banking circles is to get immediate payment, isn't it? A. Yes.
"Q. And immediate payment was made at the time the check was presented. A. Yes.
"Q. By the issuance of your cashier's check? A. Payment was made by the cashier's check, yes."

Referring to the "paid" stamp which was placed on the Kelleck check by the messenger of the U. S. National, Moore testified: "That is merely the stamp that is the messenger's receipt or clearance for the check. It is the U. S. National's receipt for the funds."

Concerning the cashier's check, Moore testified:

"Q. And your cashier's check was paid by you and so stamped on the date of its issue, September 24th, was it not? A. Yes, sir.
"Q. What does it mean when you issue a cashier's check and then it comes back to you and you stamp it "paid," what does that mean? A. It means merely that it is paid.
"Q. Well, that is what I would think. There is no doubt in your mind but what that cashier's check was paid, is there? A. No, the cashier's check was paid, but the consideration for it was found to be practically valueless, the consideration given in payment for it.
"Q. That may be true, but your cashier's check was issued and paid by you? A. That is true."

Again he testified:

"A. I would say it is the practice and custom to accept cashier's checks in local banks very much the same as cash because of our confidence in the solvency of the bank, whether it is one in favor of us or whether we are cashing it for an individual.

"Q. That is the general custom and practice in the community? A. That is true."

Concerning the October entry of an overdraft as of September 24 on the Kelleck ledger, Zollinger of the First National testified: "It seemed to me that the best way to take it out of suspense was to make a charge against the account by our form Miscellaneous 6, which is the advice of charge, showing on its face that the reason for the charge was a check drawn by the depositor and paid by mistake, and then to charge off the amount of that item, so that it would not appear in our financial statement that we were holding valid and collectible assets, undisputed assets which were represented by that balance."

The efforts of the First National to secure payment from Kelleck continued into October at which time Kelleck undertook to make payment in installments.

Concerning the issuance of the cashier's check, Zollinger testified as follows:

"Q. For what purpose? A. Application had been made for the issuance and delivery of the cashier's check, and as I view it, the Kelleck check was tendered in payment for the cashier's check as consideration for its issuance.

"Q. And you issued a cashier's check in payment of the Kelleck check, didn't you? A. Well, I am not going to testify to that effect, Mr. Beckett. I don't think that is the fact.

Q. Let me ask you this: suppose the Chase National Bank of New York is your correspondent and they send out a check to you here that is drawn on the U. S. National Bank for ten thousand dollars and ask you to present it to the United States National Bank for payment, and you send your messenger over to the United States National to their Collection Exchange Department and present it and the United States National Bank issues its cashier's check payable to the First National Bank of Portland (Oregon) and the Chase National Bank has asked you to communicate with them at once whether that check was paid. You would wire the Chase National Bank immediately upon that cashier's check being given to you that that item was paid, wouldn't you? A. I think we would."

When asked if cashier's checks of solvent institutions are treated as cash, Zollinger testified that they were not always so treated and gave as an illustration the fact that when a cashier's check is lost another one is issued. He then testified as follows:

"Q. All right. That is one thing. Where is another instance where it is not treated as currency? A. Within the scope of my own experience I don't think I can answer any other instance in which a different result flows because of the distinction. . . .

"Q. All right. At the time you wrote that letter, which was September 30, six days after you had issued your cashier's check, you

considered, did you not, that you had paid the money for the Kelleck check? A. I think probably that I did.

"Q. Yes. And when did it first occur to you that you had not paid it? A. This distinction between a payment of the Kelleck check and the issuance of a cashier's check in consideration of the Kelleck check is one which I do not think was made for a substantial period after that, in my own thinking on the subject.

"Q. In other words, as far as you were concerned, it was not until a considerable time after you wrote this letter that it occurred to you or was called to your attention that possibly there was not a payment of the Kelleck check, is that it? A. That is correct."

Mr. Arnold of the U. S. National testified that his bank accepted the cashier's check as a solvent credit and also that the cashier's check was paid.

Arnold, on September 28, wrote Mrs. Noble in part as follows:

". . . This cashier's check was paid, and the proceeds placed to your account. Immediately thereafter The First National Bank notified this bank that payment had been made by mistake, as there were insufficient funds in the account of West Coast Brokerage Company or E. Kelleck to pay that check, and this bank has now received from The First National Bank written demand for the return of this money on the ground that payment was made by mistake.

"Since the duties of this bank were completed upon receipt of the proceeds of this check, we are referring this matter to you for instructions."

On October 9, D. R. Smith, assistant cashier of the U. S. National, wrote Mrs. Noble: "We regret that the neighboring bank has caused you any inconvenience on this transaction as the check was cleared through that institution and credited in final payment to your savings here."

On cross examination Arnold testified:

"Q. Well, you know more about the banking business than I do, so maybe I cannot express it as clearly as you think it should be expressed. But I can only say this, I would like you to assume hypothetically that his cashier's check had not resulted in any benefit or credit to the United States National Bank, but that it had first been placed to the credit of the Noble account in the manner in which you placed it to the credit of the Noble account, but that before you got any benefit from it in a Federal Reserve balance or otherwise, liability was repudiated by the First National Bank, such as, for example, that the signature of the signing officer had been forged, would you then have exercised any right to charge back the amount of the cashier's check to the Nobles' account, or would you have considered yourself absolutely liable to the Nobles? A. . . . I think that the reason why we withheld charging the cashier's check was due to the fact that we had already run through our bank as an entry and had advised the Nobles of the credit of the cashier's check. I admit that my own feelings at the time were that the cashier's

check was a final credit. I don't believe any of us felt at that time that the fact that it was being honored entered the picture at all."

The plaintiff relies strongly upon the printed provisions of the savings deposit slips employed by the U. S. National in crediting the Nobles account. They provided "All items are credited conditionally at the time of deposit . . . ." Under that provision the Kelleck check was credited conditionally on September 21. The next provision of the deposit slip reads as follows: ". . . And for the convenience of the depositor, the bank may accept from any drawee bank, or collecting agent an exchange draft, or credit therefor, as conditional payment in lieu of cash, and the bank will only be liable when the proceeds in actual funds or solvent credits, come into its possession. . . . The bank may charge back any item at any time before ultimate payment, whether returned or not . . . ."

If, when the Kelleck check was presented by the messenger, the U. S. National had accepted "an exchange draft or credit" from the First National, that too might have been conditional payment because the bank on which the exchange draft was drawn might have refused to honor it. But the cashier's check of the First National was not an exchange draft or credit within the meaning of the provision. It was the direct obligation of the First National. It was a solvent credit; and, when it came into the possession of the U. S. National as collecting agent, that bank became, under the express terms of the contract, "liable" to the Nobles. It could not charge the item back, for it had received "ultimate payment." In re Bank of United States, 243 App. Div. 287, 277 N. Y. S. 96; O. C. L. A. § 40-2209.

Part I, Section 2, of the Clearing House Rules provides:

"B. Messenger's Paid Stamps:

"The Paid Stamp used by messengers of Member Banks on items presented directly at the counters of Member Banks shall be construed to guarantee previous endorsements. Member Banks shall only make payment to such messengers for such items with their Cashiers check, unless endorsed by the autographic signature of an officer of the collecting bank."

Obviously this rule was adopted to avoid the inconvenience and risk involved in the physical transfer of currency from bank to bank. The rule contemplates that, when items are presented by messenger over the counter of a drawee bank, the collecting bank has an option to take cash or cashier's check, the option to take cash being manifested by an autographic signature. The existence of an option to accept either cash or cashier's check, coupled with an election to take the latter and accompanied by the surrender of the original item to the drawee bank, constitutes persuasive evidence of unconditional payment of the item. 40 Am. Jur., Payment, § 80, p. 770. It may be that delivery to the

messenger of a draft on another institution in exchange for the item might present a different question. But see Johnson v. First State Bank, supra.

Part I, Section 1, of the Clearing House Rules provides:

"Returned Items:
"Dishonored items shall be returned to the Clearing House not later than 11:00 o'clock A. M. on the following business day, except that Cashier's checks, certified checks, and items drawn by other banks; (a) on a drawee member, or (b) marked 'Payable if Desired' at a drawee member, unpaid upon presentation, shall be returned to the clearing bank not later than 4:00 P. M. on the day on which they are presented."

Witness Moore of the First National testified that in view of the general practice to return dishonored items at eleven o'clock he could "assume" that the Kelleck check was returned to the U. S. National by 11 A. M. Saturday. But the Kelleck check was not either a returned item or a dishonored item. It had been honored by the First National. It bore their stamp "Paid through Clearing House . . .," etc., under date of September 25, and the cashier's check had been issued in exchange for it.

Moore testified further:

"Q. No, but the general practice and custom of the Clearing House banks is to run through clearings for recoupment only those items that have been presented through clearings. Now you are a banker. That is true, isn't it? A. That is true. That is the general practice, but I don't believe the Clearing House Rules in so many words limit it or restrict it only to that.
"Q. But that is the general practice? A. That is the practice, yes, sir.
"Q. That you all adhere to? A. That is usual practice, I would say."

Moore later testified that errors of the kind involved "so seldom occur" that "I don't believe there is any practice."

Emmons of the First National testified:

"Q. In making up the list of items for which you seek reclamation, do you ever present an item through the Clearing House that was not paid through the Clearing House? A. Well, ordinarily we don't because—
"Q. (interrupting) What is it? A. Ordinarily we don't. I don't remember of seeing an item so presented."

Witness Cochran of the Clearing House testified:

"Q. In other words, there are many transactions that are handled direct by messenger between one bank and another? A. Yes sir.
"Q. And transactions of that character are not embraced within the Clearing House Constitution or Rules? A. I would say no."

Immediately thereafter, and expressing a somwhat different opinion, the witness said: "In so far as the item received by the messenger and exchanged for a check, customer's check, then the item cleared through the Clearing House would be under Clearing House Rules."

However, upon further examination the witness returned to his original opinion:

"Q. Mr. Cochran, where one member bank sends a check by messenger to the Exchage Department of another member bank to effect collection of the check, is that governed by the Clearing House Rules and Constitution? A. I don't believe so.

"Q. What is it? A. I don't think so; I don't believe so. It is a transaction between the two banks.

"Q. It is a direct transaction, is it not, between the two institutions? A. Yes, sir.

"Q. Under the Rules of the Association and Constitution it provides for returned items, doesn't it? A. Yes, sir.

"Q. A returned item is one where one bank presents the item to another one and receives credit in the first instance through the Clearing House, isn't that true? A. Yes, sir.

"Q. And then the drawee bank upon examining the instrument after it has received it, for some reason, like insufficient funds or faulty signature or some reason of that sort, may wish to reject the item? A. Yes, sir. . . .

"Q. Yes. Mr. Cochran, take a case where a check is sent by one bank to another by messenger for collection and the bank to whom it is sent takes up the check and issues its cashier's check payable to the presenting bank, and the cashier's check is handed to the messenger—do you get that state of facts? A. Yes, sir.

"Q. Then that is a direct transaction between the two banks, isn't it? A. Yes, sir.

"Q. To which the Clearing House Rules or Constitution have no application, isn't that true? A. To my knowledge, yes.

"Q. To your best knowledge, yes? A. Yes.

"Q. All right. Under your Clearing House Rules, your Constitution, can the bank that took up the check and issued its cashier's check in payment, return the check,—not the cashier's check, but the check, back through the Clearing House mechanism to the bank that received the cashier's check? A. As the Secretary of the Clearing House Association I don't think that point is covered in the Constitution and Rules.

"Q. You have studied these Rules, I assume, with great care over a long period of time? A. I have read them through, yes.

"Q. From a general reading of the Rules do you see anything in them that would countenance or support the right of the bank that took up the check, to use the Clearing House mechanism for returning it, where the transaction originally was handled direct? A. No, I haven't—

"Q. (Interrupting) What is it? A. No, sir. . . ."

On further examination by the plaintiff, he testified:

"Q. Yes. If the collecting bank elected to make use of the channels of the Clearing House for collection of the cashier's check, then that process would be subject to the rules of the Clearing House? A. Yes, sir."

There was some inconsistency or vacillation in the testimony of witnesses Moore and Cochran, but they and all the other witnesses testified with great candor. There was no ground for impeachment and none was attempted. In the main the witnesses testified concerning the actual practice of and between the banks as we have above set forth. The minor discrepancies arose from answers skillfully elicited in support of a legal theory of conditional payment. The testimony as a whole supports the view that the clearing house rules did not apply to the Kelleck check when presented by messenger and that the cashier's check did constitute absolute payment. It was not in any sense a "dishonored" or "returned" item to which the rule in question could apply.

Article XIV, Section 2, of the Constitution of the Portland Clearing House provides in part as follows: "Sec. 2. Errors in the exchanges and claims arising from the return of checks or from any other cause, are not to be adjusted through the Portland Branch of the Federal Reserve Bank but directly between the members who are the parties to them; all checks and drafts in the exchanges not found good, or missent, shall be returned without intentional mutilation, or notice of dishonor, directly to the member from whom they were received, and the said member shall immediately refund to the bank returning the same, the amount for which it has received credit through the Clearing Settlement for the said checks or drafts so returned to it. . . ."

The cashier's check issued by the First National Bank over the counter but sent through clearing for collection was not within the definition of a check or draft "not found good" within the meaning of the rule.

The clearing house rules must be construed in the light of the obvious reason for their existence. When a check on a drawee bank is presented through the clearing house for collection, as a matter of convenience credit is given to the presenting bank and the drawee bank is charged with the amount of the item. This occurs before the drawee has seen the instrument or has any knowledge concerning its validity sufficiency or existence. The rules provide a period of grace so that before the credit and debit items become final, the drawee may examine the check, determine its genuineness and the sufficiency of the drawer's account; and, if it appears invalid or N. S. F., the bank may by acting promptly under the rules protect itself. But when an item is presented for payment by messenger, the opportunity

for full investigation precedes the extension of credit or the making of payment instead of following it as is the case of checks presented through the clearing house. There is no reason to construe the rules as giving a second chance to investigate before payment becomes final when the drawee has already had one full opportunity therefor.

We have concluded that the asserted right of the plaintiff to restitution must be considered exactly as if the Kelleck check had been paid over the counter in cash. Our conclusion is further supported by the following authorities. See Causey v. Eiland, 175 Ark. 929, 1 S. W. 2d 1008, 56 A. L. R. 532; Polotsky v. Artisans Sav. Bank, 37 Del. 151, 188 A. 63, 65, 107 A. L. R. 1464.

"Then, too, a banker's check is markedly distinguishable in its nature from a cashier's check to which in point of countermandability it was likened by the majority of the court in Kohler v. First National Bank of Tonasket, supra [157 Wash. 417, 289 P. 47]. A cashier's check is, as we understand the term, a check drawn by a bank upon itself to the order of the payee named therein. Such a check is denominated by the courts as being what in reason it is, a bill of exchange drawn by a bank upon itself and accepted in advance by the act of its issuance. Drinkall v. Movius State Bank, 11 N. D. 10, 88 N. W. 724, 57 L. R. A. 341, 95 Am. St. Rep. 693; Causey v. Eiland, supra. It therefore possesses none of the characteristics of a mere order to pay money. It is a primary obligation of the bank. Bank of Statham v. National Bank of Athens, 143 Ga. 293, 84 S. E. 966. It becomes the obligation of the issuing bank as much so as if the bank had given a promissory note instead of its check. Scott v. Seaboard Securities Co., 143 Wash. 514, 255 P. 660; Walker v. Sellers, 201 Ala. 189, 77 So. 715. The instrument, therefore, being one of primary obligation on the part of the bank, there can be no right of countermand by it such as exists where the document constitutes a mere direction or order to pay. The difference is a most material one." Polotsky v. Artisans Savings Bank, supra.

In re Bank of United States presents a similar situation. In that case the drawer issued a check against his account in the Bank of the United States, making it payable to the order of the National City Bank, and he then deposited it with the latter bank. The payee bank presented the check by messenger to the drawee bank for payment and received a cashier's check for the amount. This was in accordance with usual banking practice designed to dispense with the unnecessary transportation of cash. Before the cashier's check was paid, the Bank of the United States was taken over by the superintendent of banks. The court said [243 App. Div. 287, 277 N. Y. S. 100]: "A cashier's check issued by a bank, however, is not an ordinary draft. The latter is a bill of exchange payable on demand. It is an order upon a third party purporting to be drawn upon a deposit of funds. Drinkall v. Movius State Bank, 11 N. D. 10, 88 N. W. 724, 57 L. R. A. 341, 95

Am. St. Rep. 693; State v. Tyler County State Bank, Tex. Com. App., 277 S. W. 625, 42 A. L. R. 1347. A cashier's check is of a very different character. It is the primary obligation of the bank which issues it (Nissenbaum v. State, 38 Ga. App. 253, 143 S. E. 776) and constitutes its written promise to pay upon demand (Steinmetz v. Schultz, 59 S. D. 603, 241 N. W. 734). It has been said that a cashier's check is a bill of exchange drawn by a bank upon itself, accepted in advance by the very act of issuance. Kohler v. First National Bank of Tonasket, 157 Wash. 417, 289 P. 47; Causey v. Eiland, 175 Ark. 929, 1 S. W. 2d 1008, 56 A. L. R. 529; Walker v. Sellers, 201 Ala. 189, 77 So. 715; Anderson v. Bank of Tupelo, 135 Miss. 351, 100 So. 179; Montana-Wyoming Association of Credit Men v. Commercial National Bank of Miles City, 80 Mont. 174, 259 P. 1060. Such being the nature of the obligation which was accepted in exchange for the claimant's check, it seems clear to us that it created an unconditional credit in favor of the National City Bank which was reflected by appropriate entries on the books of the Bank of United States. Matter of Bank of United States 264 N. Y. 414, 191 N. E. 491. The Bank of United States remained the debtor, and the only debtor, to the holder of its cashier's check for the amount of the deposit. . . ." In re Bank of United States, supra. And see Lindsay v. Elliott, 4 Cir., 77 F. 2d 95.

It is a general rule "that money paid to another under the influence of a mistake of fact, that is, on the mistaken supposition of the existence of a specific fact which would entitle the other to the money, which would not have been paid if it had been known to the payor that the fact was otherwise, may be recovered, provided the payment has not caused such a change in the position of the payee that it would be unjust to require a refund." 40 Am. Jur., § 187, p. 844. The test which determines whether a recovery may be had is whether the defendant in equity and good conscience is entitled to retain the money to which the plaintiff asserts claim. 40 Am. Jur., Payment, § 187, p. 844; Scott v. Ford, 45 Or. 531, 78 P. 742, 80 P. 899, 68 L. R. A. 469; Smith v. Rubel, 140 Or. 422, 13 P. 2d 1078, 87 A. L. R. 644; Restatement, Restitution, §§ 15 to 26, incl.

It is also the general rule that the failure of the payor to exercise ordinary care to avoid mistake will not as a matter of law defeat his recovery. Smith v. Rubel, supra; 40 Am. Jur., Payment, § 194. But it is held that ignorance of facts "must be excusable, that is, it must not arise from the intentional neglect of the party to investigate them." Scott, v. Ford, supra, 45 Or. at page 552, 78 P. 742, 80 P. 899, 900, 68 L. R. A. 469. Smith v. Rubel, supra, 140 Or. at page 427, 13 P. 2d 1078, 87 A. L. R. 644; 40 Am. Jur., Payment, § 194, p. 848. And under the Restatement of Restitution, §§ 15 and 16, negligence may be relevant in determining whether it is equitable to allow recovery. Re-

statement, Restitution, § 15, comment b; § 16, comment b; and 142, comment c. And see Restatement page 574.

It is not every payment of money by mistake for which restitution is allowed. Payments induced by mistake of law are not recoverable, although, as said by Justice Wolverton in Scott v. Ford, supra [45 Or. 531, 78 P. 747]: "In the abstract, it was assuredly against conscience in any of these cases for the parties receiving the money to retain it, for they parted with no adequate or material consideration for it; yet, when connected with the facts of the cases, the courts say that, having paid voluntarily, with knowledge of the facts, but under a mistake of law, the money so paid is not recoverable, and, in effect, that it is not inimical to the maxim 'Ex æquo et bono,' or against good conscience, for the one receiving it to retain it." Scott v. Ford, supra.

Money paid as a volunteer with knowledge of the facts and not induced by duress or fraud cannot be recovered back. Gabel v. Armstrong, 88 Or. 84, 87, 171 P. 190; Eugene v. Lane County, 50 Or. 468, 93 P. 255. Even in the case of payments made by mistake of fact, restitution may be denied under some circumstances.

"A person who confers a benefit upon another, manifesting that he does so as an offer of a bargain which the other accepts or as the acceptance of an offer which the other has made, is not entitled to restitution because of a mistake which the other does not share and the existence of which the other does not know or suspect." Restatement, Restitution, § 12.

"A person who has paid to another money which the other honestly claimed to be due but which was not due is not entitled to restitution merely because of his mistaken belief that the evidence to disprove the claim did not exist or was not available." Id. § 27.

It is highly significant that the authors of the Restatement on Restition, among whom there are such eminent authorities as Seavey, Scott, Bohlen and Williston, deemed it necessany to state the "Special Rules for Bills and Notes" under a separate title. Sections 30 to 38 are modifications as applied to bills and notes of the earlier general rules relative to recovery of payments made by mistake. Rule 33 is directly in point and unless rejected by us, must control the decision of this case. It is as follows:

"The holder of a check or other bill of exchange who, having paid value in good faith therefor, receives payment from the drawee without reason to know that the drawee is mistaken, is under no duty of restitution to him although the drawee pays because of a mistaken belief that he has sufficient funds of the drawer or that he is otherwise under a duty to pay." Restatement, Restitution § 33.

". . . . The payee is entitled to retain the money which he has received as a bona fide purchaser. The typical cases are those where an employee of a bank pays the holder of a check in a mistaken belief that the drawer has sufficient funds on deposit to meet it or in forgetfulness

of the fact that the drawer has directed that payment should not be made. . . ." Id. § 33, comment a.

"A draws a check for $1,000 on the B bank in which he has funds only amounting to $500, making the check payable to C who receives it in satisfaction of a mortgage. Without reason to know of the state of A's account, C demands and receives payment from B. B is not entitled to restitution from C." Id § 33, Illustration 1.

It will be observed that in both the rule and illustration there is no requirement that the recipient of the payment shall have changed his position to his detriment in reliance upon the payment. We have, however, already intimated that in a commercial transaction involving negotiable instruments the payment by and the surrender to the drawee of the bill or the check which carries the drawer's signature may, as a matter of law, be deemed a change of position such as would make restitution inequitable.

Rule 33 of the Restatement is not a solitary exception to the general rule. Restitution is denied where the bank under similar circumstances pays by reason of a mistake as to the identity of the drawer. Restatement, Restitution, comment a, p. 139. A similar rule which we think indistinguishable in principle is set forth in the Restatement as follows:

"The holder of a bill of exchange or promissory note who has received payment thereof from one whose name was forged thereon as a party, or from a drawee on a bill on which the drawer's name was forged, is not thereby under a duty of restitution if he paid value and received payment without reason to know that the signature was forged. . . .

"Comment: . . . . The rule also applies where the holder of a bill of exchange on which the name of the drawer is forged receives payment from the drawee, with or without prior acceptance and irrespective of whether the holder became such before or after acceptance." Id. § 30.

Section 30 of the Restatement embodies the rule of Price v. Neal, 3 Burr 1354, decided by Lord Mansfield in 1762. The doctrine has word "accepting" and not the word "paying" is employed in O.C.L.A. §§ 69-503, 69-1002 and 69-1005, N.I.L. §§ 62, 165, 188. Although the word "accepting" and not the word "paying" is employed in O.C.LA. § 69-303 this court has held that the section includes payment as well as acceptance of a bill. Under that section when a holder for value in due course presents a check on which the name of the drawer has been forged, "and the drawee pays the instrument, the holder and drawee being alike ignorant that the signature of the ostensible drawer was forged, and it is subsequently discovered that the signature of the drawer was forged, the drawee cannot recover the payment made to the holder." First National Bank v. United States National Bank 100 Or. 264, 272, 197 P. 547, 550, 14 A.L.R. 479. And see 100 Or. page 279, 197 P. 552.

In that case the name of the drawer was forged on checks drawn on the drawee First National Bank. The forgers, as payees, endorsed them to various merchants who deposited them for collection in the United States National. They were paid through the clearing house by the drawee. On discovery of the forgery the drawee sued the United States National for restitution. There was no purchase of the paper on the faith of a previous certification or acceptance by the drawee. It was a simple case of payment to one who had previously acquired the paper for value and in good faith. Yet this court held that the drawee had no right of restitution.

The rule of Price v. Neal, as adopted in Oregon, is too firmly established to permit question at this time. The only required act of reliance or change of position is the acceptance in good faith of payment. No distinction is made between the case of one who, as indorsee after acceptance of a forged bill, receives payment, and the case of one who as holder receives payment without prior acceptance.

In the case of National Bank of Commerce v. Baltimore Commercial Bank, 141 Md. 554, 118 A. 855, 29 A.L.R. 135, there was a dictum to the effect that certification can be revoked on the ground of mistake as to the sufficiency of the drawer's funds. We quote from Brannan's Negotiable Instruments Law as follows: "The dictum is questionable. An acceptor can not revoke his acceptance because of a mistake as to the genuineness of the drawer's signature, under sec. 62, and it is equally within his power to ascertain the state of the drawer's account before accepting, so that this type of mistake should also be held insufficient to justify revocation. Change of position should be unnecessary as in the forgery cases." Brannan, Negotiable Instruments Law, 6th Ed., § 187, p. 1150.

A payee of a negotiable instrument is a holder, O.C.L.A. § 69-1101, N.I.L. § 191, and may be a holder in due course if he brings himself within the provisions of O.C.L.A. § 69-402, N.I.L. § 52. American National Bank v. Kerley, 109 Or. 155, 220 P. 116, 32 A.L.R. 262; Brannan, op. cit. page 543; 97 A.L.R. 1215. The Nobles were holders whose position was similar to that of the holder in First National Bank v. United States National Bank, supra. They paid value for the bill and received payment thereof without reason to know that the Kelleck check was N. S. F., "a change of position should be unnecessary," except as may arise by operation of law.

Other instances in which restitution is denied, despite the fact that payment was made by mistake, are cited in the Restatement of the Law of Restitution, § 31, "Raised Instruments," and § 32, "Spurious Accompanying Security."

Plaintiff relies strongly upon the case of Security Savings & Trust Co. v. King, 69 Or. 228, 138 P. 465, 466, as establishing the right of

restitution in Oregon. That was an action by the Security Savings & Trust Company, as plaintiff, to recover from the defendant King, one of its depositors, the amount of an alleged overdraft. Dempster, as, drawer, on September 27, 1911, issued and delivered to King a check on the Imperial Bank of Canada payable in cash. King deposited it for collection in the plaintiff bank in Portland. The deposit was made upon the terms of a written contract between the depositor and the bank which reads in part as follows: "In receiving checks, drafts or other paper on deposit payable elsewhere than in Portland this bank assumes no liability for the failure of any of its direct or indirect collecting agents whether the collecting agent be the person or concern on which the check for collection is drawn or not, and shall only be held liable when proceeds in actual funds or solvent credits shall have come into its possession. Under these provisions items previously credited may be charged back to the depositor's account. . . ."

Upon the deposit of the check by the defendant in the plaintiff bank, the plaintiff immediately forwarded it to its correspondent, the Northern Crown Bank, at Vancouver, B. C. On the day of its issuance the drawer notified the drawee bank not to pay the check. In the forenoon of September 30, the Crown Bank presented the check to the drawee Imperial Bank for payment. The drawee overlooked the stop payment order of the drawer and by mistake certified the check and charged the account to the drawer. The Crown Bank received the certified check, charged the account of the Imperial Bank and remitted the amount out of its own funds to the plaintiff bank. On the evening of the same day the drawee bank discovered the error and immediately notified the Crown Bank. The notice was received, however, after the remittance by the Crown Bank to the plaintiff. The Crown Bank then wired the plaintiff that the drawer's check was "unpaid and remitted for by us today in error." The plaintiff bank exhibited to the defendant the contents of the wire, whereupon the defendant left for Vancouver, B. C., from which point on October 4 he wired the plaintiff that if it would return the check to him he would make collection. The defendant received the check but failed to make collection and returned it to the plaintiff. The plaintiff received notice of the erroneous remittance four days before the receipt by it of the draft from the Crown Bank. On receipt of the draft and on October 4, the plaintiff remitted to the Crown Bank the amount involved which canceled the credit previously given the defendant. In the meantime the defendant had cashed checks on the plaintiff bank which created an apparent overdraft and for which the plaintiff brought suit. It was held on appeal that the plaintiff bank was entitled to recover.

The court said: "In a consideration of this case, the mind must keep before it the terms of the contract had between plaintiff and defendant

. . ." The contract provided that the plaintiff "shall only be held liable when proceeds in actual funds or solvent credits shall have come into its possession. Under these provisions items previously credited may be charged back to the depositor's account." But that was not the entire contract. It was also agreed that "his bank assumes no liability for the failure of any of its direct or indirect collecting agents whether the collecting agent be the person or concern on which the check for collection is drawn or not . . ."

By the depositor's contract the plaintiff bank assumed no liability for the failures of either the Crown Bank or the Imperial Bank on which the check was drawn. The evident import of the contract was that receipt of funds by plaintiff's agent should not be deemed receipt by the plaintiff who should become liable only when actual funds or solvent credits shall have come into its possession. It follows that as between the plaintiff and the defendant, the plaintiff was free to charge the check back against the defndant's account and remit to the Crown Bank the amount of the draft which it had received. This court said: "Proceeds in actual funds mean the real funds inuring from a collection of the check or negotiable paper free from embarrassment and convertible into cash." When the defendant first deposited with plaintiff the drawer's check for collection, he received a conditional credit which never became absolute, for the plaintiff never personally received negotiable paper "free from embarrassment and convertible into cash." The court in the King case cites Scott v. Ford, and then says: "And in case of payment by a bank to the owner of paper deposited with it for collection the same rule applies, so that money paid under a mistake of fact may be recovered, although there was negligence on the part of the bank in remitting the payment, subject to the condition that payment cannot be realized if the position of the person to whom the payment had been made has been changed to his prejudice towards his debtor in consequence of the payment . . . ." Security Savings & Trust Co. v. King supra.

The only authority cited is 2 Michie, Banks and Banking (1913 Ed.) § 169.

Both the rule as stated by the court and the authority cited relate to a situation wholly different from that in the case at bar. Michie § 169 upholds the right of restitution in the case of negligent payment by a bank to the owner of paper deposited with it for collection. As between the collecting bank and its depositor, this court and the authority cited adopted the general rule of Scott v. Ford which permits restitution if the recipient of the payment has not changed his position, but the same volume and edition of Michie, on which this court relied in the King case, lays down a different rule in the case of payment by mistake made by the drawee to the holder.

"In the absence of fraud on the part of the holder, the payment of a check by a bank is regarded as a finality, and the fact that the drawer has not funds on deposit will not give the bank any remedy against the holder." 2 Michie, Banks and Banking (1913 Ed.) § 142 (2b) and (2ba).

"A mistake in regard to the amount of a customer's deposit is not such a mistake of fact as entitles a bank paying a check to recover back the amount from the payee. Such transaction is not a mistake of fact in a legal sense, only laches. Banks are supposed to be informed of a depositor's financial standing, and to know the condition of his account with them at the time of presentation of checks for payment. They are required, and for their own safety are compelled, to know at all times the balance to the credit of each individual customer, and they accept and pay checks at their own risk and peril. If from negligence or inattention to their own affairs banks improvidently pay when the account of a customer is not in a condition to warrant it, and if by mistake a check is paid when the drawer has no funds, the bank must look to the customer for rectification, not to the party to whom the check was paid. . . ." 2 Michie, Banks and Banking (1913 Ed.) § 142 (2bd). The same rule is found supported in 5 Michie, Banks and Banking (Perm. Ed.) § 229, p. 418.

Other authorities which support the rule of § 33 of the Restatement on Restitution, either directly or by close analogy, are as follows: First National Bank v. Burkhardt, 100 U. S. 686, 25 L. Ed. 766; Levy v. Bank of United States, 4 Dall. 234, 1 L. Ed. 814; Hayes v. Tootle-Lacy Nat. Bank, 10 Cir., 72 F. 2d 429; Security Nat. Bank of Sioux City, Iowa v. Old Nat. Bank, 8 Cir., 241 F. 1; Riverside Bank v. First Nat. Bank of Shenandoah, supra; Bank of Moulton v. Bankin, 24 Ala. App. 110, 131 So. 450; First Nat. Bank of Denver v. Devenish, 15 Colo. 229, 25 P. 177, 22 Am. St. Rep. 394; Bank of Commerce v. Reis, 253 Ky. 648, 69 S. W. 754; Thompson v. First State Bank of Irvington, 216 Ky. 703, 288 S. W. 702; First National Bank of Owentown v. Sidebottom, 147 Ky. 690, 145 S. W. 404; Neal v. Coburn, 92 Me. 139, 42 A. 348, 69 Am. St. Rep. 495; National Exchange Bank of Baltimore v. Ginn & Co., 114 Md. 181, 78 A. 1026, 33 L. R. A., N. S.,963, Ann. Cas. 1914 C, 508; Manufacturers' National Bank v. Swift, 70 Md. 515, 17 A. 336, 14 Am. St. Rep. 381; Dedham National Bank v. Everett National Bank (opinion by Holmes, C. J.), 177 Mass. 392, 59 N. E. 62, 83 Am. St. Rep. 286 (cited with approval in First Nat. Bank v. United States Nat. Bank, supra); Boylston National Bank v. Richardson, 101 Mass. 287; Withers v. Jefferson Trust Co., 123 N. J. Eq. 113, 196 A. 442; Liberty Trust Co. v. Haggerty, 92 N. J. Eq. 609, 113 A. 596; National Bank of New Jersey v. Berrall, 70 N. J. L. 757, 58 A. 189, 66 L. R. A. 599, 103 Am. St. Rep. 821, 1 Ann. Cas. 630; Oddie v. National City Bank, 45 N. Y. 735, 6 Am. Rep. 160; Bank of State of South Carolina v. Hull, Dud., S. C., 259; Huffman v. Farmers' Nat. Bank, Tex. Civ. App., 10 S. W. 2d 753; Citizens' Bank of Norfolk v. Schwarzchild & Sulzberger Co., 109 Va.

539, 64 S. E. 954, 23 L. R. A., N. S., 1092; Oregon Iron & Steel Co. v. Kelso State Bank, 129 Wash. 109, 224 P. 569, 38 A. L. R. 178; Spokane & Eastern Trust Co. v. Huff, 63 Wash. 225, 115 P. 80, 33 L. R. A., N. S., 1023, Ann. Cas. 1912D, 491; Pollard v. Bank of England, L. R., 6 Q. B. 622; 7 Am. Jur., Banks, § 611, p. 443; 9 C. J. S., Banks and Banking, § 354, p. 722 et seq.; 2 Morse, Banks and Banking, 6th Ed., § 455, p. 1001; 7 Zollmann, Banks and Banking, Perm. Ed., § 5062, p. 445.

To the foregoing must be added the weighty authority of Professor Williston who says: "If a bank pays a draft or check on the mistaken assumption that the drawer has sufficient funds to his credit to meet the instrument, no recovery of payment can be had if this assumption turns out to be an error." 5 Williston, Contracts (Rev. Ed.) § 1572, p. 4396.

The reasons which support the rule denying restitution in the case of payment by the drawee of a forged check apply also in the case at bar. As said by Justice Harris in First Nat. Bank v. United States Nat. Bank, supra: "Some judges rest the rule upon grounds of estoppel; others say that it is governed by the principles of negligence; and still others invoke the principle of natural justice, that as between two persons, one of whom must suffer, the legal title shall prevail. Frequently the suggestion is made that the rule arises out of considerations of convenience as well as of commercial necessity; for, it is said, throughout the entire business world bills of exchange and checks in large part serve as currency in each day's business transactions, and it is not only convenient but necessary that there shall be a definite time and a fixed place for final settlement, and that the best time and most appropriate place for such final settlement is the time and place when and where an instrument is presented to the drawee for payment . . . ." First Nat. Bank v. United Nat. Bank, supra.

The forgery cases are said to rest, in part at least, upon the maxim that where the equities are equal the legal title must prevail. That maxim appears applicable where the drawee bank pays a check so skillfully forged as to defy detection. The holder and the drawee are equally without fault, and the holder has the money.

The position of the defendants in the case at bar is in this respect stronger than that of one who has received payment of a forged check. Here the equities are not equal. The representative of the plaintiff was clearly negligent. He acted in reliance on a symbol which he had never before seen and the meaning of which he had no reason to know. A moment's inquiry would have informed him fully concerning the meaning of the symbol and the state of Kelleck's account. But no inquiry was made. His conduct closely approximates that of one who intentionally neglects to investigate the facts. Even under the doctrine of Scott v. Ford and Smith v. Rubel, supra, and without reference to the

special rules governing bills and notes, such a one cannot recover for payment made by mistake.

The defendants Noble are not chargeable with any neglect or inequitable conduct. Neither they or their collecting agent knew or were entitled to know the state of the Kelleck account, and the fact that the Kelleck check was N. S. P. on September 22 did not render it unconscionable to present it again on September 24. Freeport Bank of Freeport, N. Y. v. Viemeister, 227 App. Div. 457, 458, 238 N. Y. S. 169, 175.

We have examined with utmost care the cases cited by the plaintiff and which are opposed to the authorities upon which we rely. We reject them as being less in harmony with the necessities of commercial usage. The commercial transactions of banks involving negotiable instruments are no longer restricted to a single locality or state. Such transactions have become truly national in character and both certainty and uniformity are essential.

The monumental work of the American Law Institute in the preparation of the Restatement was motivated by the avowed purpose to accomplish in the future, uniformity of decision throughout the Union, notwithstanding the welter of conflicting decisions in the several states. In no field is such uniformity more essential than in this. Subject to the equitable exceptions set forth in the Restatement of Restitution (§ 34), we adhere to the rule of § 33, supra, which is decisive in this case.

The defendants Noble assign as error the decree of interpleader whereby the U. S. National was discharged upon paying the money into court. That order was signed on July 12, 1944; the final decree on December 14th of that year. The former purported to determine the rights of the U. S. National, but it did not determine the rights of the other parties. It was not an appealable order. In re Norton's Estate, Or., 1944, 151 P. 2d 719, 156 A. L. R. 617; Hoff v. Peninsula Drainage District, 172 Or. 630, 143 P. 2d 471; Murray v. Lamb, 168 Or. 596, 115 P. 2d 336, 124 P. 2d 531; Abrahamson v. Northwestern Pulp & Paper Co., 141 Or. 339, 15 P. 2d 472, 17 P. 2d 1117. And see 4 C. J. S., Appeal and Error § 118b.

Under our practice, the question as to the propriety of the intermediate decree on interpleader was raised by the appeal from the final decree of December 14th. See New Zealand Ins. Co. v. Smith, 41 Or. 466, 69 P. 268. If the right of interpleader had been denied it, the U. S. National would have been compelled to decide the merits of a legal controversy before the trial was completed, and at its peril. If at that time the bank had arrived at the same conclusion which we now reach and had honored checks of the Nobles against the deposit, it would still have been compelled to defend against the action of the plaintiff. If it decided the question of law as the lower court did and reimbursed the

plaintiff, it would have been liable under our present decision to pay a second time to the Nobles. If it had refused to pay either it would probably have been subjected to actions at law by both claimants with expense incurred in each case, and costs to the prevailing party in one.

Speaking of a bill of interpleader, Justice Wolverton for this court said:

"Such a bill will lie where two or more persons claim the same thing or debt or duty from the complainant by different or separate interests, and he does not know to which of the claimants he ought of right to deliver the thing in his custody or render the debt or duty, and by reason thereof is in fear of damage or hurt from some of them. . . .

"The allegations such a bill should contain are, in purport: (1) That two or more persons have preferred claims against the complainant; (2) that they claim the same thing; (3) that the complainant has no beneficial interest in the thing claimed; and (4) that he cannot determine, without hazard to himself, to which of the several defendants the thing belongs. Atkinson v. Manks, 1 Cow. 703." North Pacific Lumber Co. v. Lang, 28 Or. 246, 42 P. 799, 801, 52 Am. St. Rep. 780.

The court also said: "One of the essential requisites to equitable relief by bill of interpleader is that all the adverse titles of the respective claimants must be connected or dependent, or one derived from the other, or from a common source. There must be privity of some sort between all the parties, such as privity of estate, title, or contract, and the claims should be of the same nature and character." North Pacific Lumber Co. v. Lang, supra.

And see Massachusetts Mut. Life Ins. Co. v. Murdoch, D. C. Or., 56 F. Supp. 500 (opinion by Fee, J.); 30 Am. Jur., Interpleader, § 8, p. 218.

The petition in intervention in the case at bar appears to satisfy the requirements set forth in North Pacific Lumber Co. v. Lang, supra. It is suggested, however, that interpleader will not lie because of the rule that a bank is not entitled to interplead rival claimants to a deposit where the facts are such that it has incurred an independent liability to one of the claimants. In support of this position it may be said that the U. S. National had incurred an independent liability to the Nobles when it credited them with the amount of the cashier's check if not sooner. This argument, we think, results from a misunderstanding of the meaning of the independent liability rule. As said in North Pacific Lumber Co. v. Lang, supra: " 'The difficulty of maintaining a bill of interpleader is not technical, but fundamental. In this form of proceeding we cannot inquire whether the plaintiff has incurred a double liability. That result is possible. The plaintiff ought to be in a position to be heard upon the question; but on a bill of interpleader, which assumes that the plaintiff is merely a stakeholder, the plaintiff cannot be heard. Houghton v. Kendall, 7 Allen. 72. A plaintiff cannot have an order that the defendants interplead, when one important

question to be tried is whether, by reason of his own act, he is under a liability to each of them.' " North Pacific Lumber Co. v. Lang, supra.

In First National Bank of Portland v. Reynolds, 127 Me. 340, 143 A. 266, 268, 60 A.L.R. 712, it was held that "the mere fact that a contractual relation exists between plaintiff and one of the defendants, under which the fund is required to be paid to such claimant, does not of itself defeat the right of interpleader" by a bank; but that "the independent obligation covered by the rule must be such that the litigation between the defendants will not determine it, in order to warrant the dismissal of the bill." First National Bank v. Reynolds, supra.

In Bergen County Nat. Bank of Hackensack v. Sheriff of Bergen County, 121 N. J. Eq. 517, 191 A. 560, 561, the court said:

"Considered in the light of modern thought and the recent decisions of this court and that of our Court of Errors and Appeals, the legal effect of the contractual relation arising between a bank and its depositor upon and from the mere opening of a bank account is, of itself, not sufficient to defeat the bank's right of interpleader as against such depositor and adverse claimants to the funds on deposit with it. Trust Co. of New Jersey v. Biddle et al., 112 N. J. Eq. 347, 164 A. 583; Camden Safe Deposit & Trust Co. v. Barbour et al., 117 N.J. Eq. 401, 176 A. 313, 97 A.L.R. 993. Were the law otherwise, it would, indeed, be most difficult to conceive of a set of facts under which a bank or other custodian of funds would ever be able to maintain an interpleader action against the depositor and the adverse claimants of the deposited funds.

"It is, and should be, the policy of this court to afford protection to persons occupying the status of stakeholders or agents, whose only interest in the property claimed is an honest desire to pay or deliver it to whomsoever may be rightfully entitled thereto, from the vexation incidental to the litigation which may possibly be brought against them by the various adverse claimants of the property involved. Lozier's Ex'rs v. Van Saun's Adm'rs, 3 N. J. Eq. 325. Unqualified approval of this just and equitable principle, despite the complainant's existing independent liability to one of the defendants, is to be found in the cases of Leber et. al. v. Ross et al., 92 N. J. Eq. 535, 113 A. 606 (where complainants were permitted to maintain their interpleader suit as against the person for which they held, and to whom in writing they had agreed to pay, the fund and the other claimants thereto) . . ." Bergen County Nat. Bank of Hackensack v. Sheriff of Bergen County, supra.

See also Jones v. Walsh, 194 Miss. 247, 11 So.2d 908; Phillips v. Alford, Mo.App., 90 S.W.2d 1060; Camden Safe Deposit & Trust Co. v. Barbour, 117 N.J.Eq. 401, 176 A. 313, 97 A.L.R. 993; Trust Co. of New Jersey v. Biddle, 112 N.J.Eq. 347, 164 A. 583; Sasanow v. Williamsburg Sav. Bank, 256 App.Div. 928, 9 N.Y.S.2d 782; Slaymaker v. Snyder County State Bank, 308 Pa. 271, 162 A. 217; Old Colony Co-op. Bank v. Burger, 63 R.I. 223, 7 A.2d 725. And in Gillespie v. Citizens

Nat. Bank of Weatherford, Tex.Civ.App., 97 S.W.2d 310, 313, it was held that "In determining the sufficiency of the facts to authorize the remedy of interpleader every reasonable doubt should be resolved in favor of the right to the bill." See also 5 Michie, Banks and Banking § 362, p. 694; 60 A.L.R. 719 (Annotation of right of bank to interplead rival claimants to deposit); 30 Am.Jur., Interpleader, § 5, p. 216.

In the case at bar the parties are not asserting independent and paramount claims. The Nobles' claim grows out of a payment made by the First National to the collecting bank on an obligation belonging to the Nobles. There was privity between the contesting parties.

We think the true test is whether the litigation between the rival claimants will fully determine all of the issues in the case. Hancock Oil Co. of California v. Independent Distributing Co., 1944, 24 Cal. 2d 497, 150 P.2d 463. If there is a right to restitution of money paid by mistake under the circumstances existing in the case at bar, then the plaintiff was entitled to the deposit. If there was no right of restitution, then clearly the Nobles were entitled to the deposit. A decision of the issue between these parties will constitute a final determination of all the issues of the case.

The contestants claim the identical deposit. The U. S. National claims no part of it. It has not incurred any such independent liability to either party as would require it to pay the amount of the deposit to the one if the court should hold that the other was entitled to the deposit. In crediting the Nobles' account, the defendant incurred a liability to them, but under the facts of this case that was one of the questions of law which has been decided in this litigation. There was reasonable ground for difference of legal opinion as to which contestant was entitled to the deposit, as witness the course of this litigation below and in this court, an uncertainty which could be resolved only by our decision. The right to interpleader cannot be decided retrospectively on the basis of our decision. It was necessary to decide the question before the legal rights of the contestants had been decided or even litigated. The U. S. National flagged the Noble account, paid the money into court and now stands as an impartial stakeholder.

The office of interpleader is not necessarily to protect against double liability; it is to protect against double vexation with respect to one liability. Pratt v. First Nat. Bank of Fayette, 243 Ala. 257, 9 So.2d 744. The trial court committed no error in entering a decree requiring the plaintiff and the defendants Noble to interplead and in discharging the U. S. National from liability. The trial court had the power in its discretion to award a reasonable attorneys' fee.

The decree in favor of the First National Bank is reversed. It is ordered, adjudged and decreed that the defendants Noble recover the

sum of $10,573.50 paid into the registry of the court, less the attorneys' fee and court costs provided for in the interlocutory decree of July 12, 1944, and that the clerk of the Circuit Court forthwith pay unto the said defendants the said sum less said attorneys' fee and costs. The decree is affirmed as to the United States National Bank. The defendants Noble may have their costs and disbursements from the plaintiff First National Bank. Except as above stated, the United States National Bank shall not recover costs.

Bank Not Precluded from Recovery On Surety Bond Despite Non-Compliance with Terms of Bond

Dubois National Bank of Dubois, Pa., v. Hartford Accident and Indemnity Co., District Court, Pennsylvainia, 64 Fed. Supp. 809

Where a bank covered by a surety company "blanket bond" for loss caused due to unlawful acts of an employee seeks to recover on bond issued by surety company for loss it sustained as a result of illegal transaction of bank president and evidence shows that surety company was informally notified of the loss and surety company's agent informed the bank that it need not file detailed proof of loss until the amount of loss was finally determined, it is held that the bank's failure to comply with the terms of the bond by filing a formal proof of claim of loss within ninety days from the date of discovery thereof does not preclude it from bringing suit against surety. The surety by its own acts is held to have waived requirement for formal proof of claim within required period.

Action by the Dubois National Bank of Dubois, Pennsylvania, against Hartford Accident & Indemnity Company, to recover on bonds issued by defendant to protect plaintiff for any loss through any dishonest, fraudulent or criminal act of any of its employees. A verdict was returned in favor of plaintiff in the amount of $21,201.50. Sur motion to set aside verdict and for judgment. Motion denied.

John J. Pentz and Pentz & Silverblatt, all of Clearfield, Pa., for plaintiff.

Alter, Wright & Barron and Gifford K. Wright, all of Pittsburgh, Pa., for defendant.

GIBSON, D. J.—The jury returned a verdict in the amount of $21,201.50 in favor of plaintiff, and defendant has moved for judgment in its favor notwithstanding the verdict.

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § 1493.

On July 1, 1940 defendant issued two bonds to plaintiff, one called a "Primary Bankers Blanket Bond," in amount of $25,000, the other designated as "Excess Bond, Form No. 2." At this time the court is concerned only with the bond first named, as the obligation of defendant, by the verdict of the jury, is under it. By it the defendant obligated itself to protect the plaintiff for "Any loss through any dishonest, fraudulent or criminal act of any of the employees, including loss of property through any such act of the employees, whether any such act may be committed and whether committed directly or by collusion with others." The second bond differed from the first bond only in detail, but protected the plaintiff substantially as did the first bond in respect to the acts of the employees.

Prior to 1942 the plaintiff was doing business with a company known as Producers Economy Coal Company, of which one C. E. Lovejoy was in charge. In January of 1942, the Coal Company had borrowed on notes purporting to be secured by assigned accounts, to over $39,000, practically to the full limit of $40,000 the bank was permitted to loan it. Still needing more money, the Coal Company obtained it from the president of the bank, W. G. Brown, who caused its checks to be honored and carried by the bank as cash items. On July 30, 1942, when a showdown with the bank examiner occured, the cash items amounted to $27,192.35. At that time the note indebtedness was $39,040.43. The cashier and two assistant cashiers had knowledge of these cash items, but the members of the Board other than Brown, denied that they had known anything about them.

Prior to this meeting on July 30, 1942, the president of the bank had secured a bill of sale of the assets of the Coal Company, which he held for the use of the bank, and the Board of Directors, on August 7, 1942, determined to take over the Coal Company, sell part of its assets, and continue the business in the hope that the bank might be saved from the apparent loss. The Bank's officers operated the coal company until May 5, 1944, when the total loss to the Bank was determined to be $43,575.67. This amount was made up of cash items to the sum of $21,201.50, and $22,374.17, loss on the notes. The Bank, by verdict of the jury, was not allowed to recover for the note loss.

Counsel for the defendant, in support of his motion for judgment, has assigned four reasons: (1) The action was prematurely brought; (2) plaintiff failed to file proof of loss within ninety days from the date of discovery thereof, as required by the insurance policy; (3) the evidence failed to establish that plaintiff relied on any waiver of the time of filing proof of loss; and (4) that plaintiff had not properly apportioned the moneys received for credit to the coal company on cash items entered after July 20, 1942.

The reasons assigned all relate to the alleged non-compliance of

plaintiff with the terms of the bond. There can be no denial of the fact that the loss to the bank on the cash items was due to unlawful acts of W. G. Brown, president of the bank.

After the defendant had been notified informally of the loss to the Bank, an agent of defendant visited the Bank and was then fully notified of the facts as they were then known to exist. This visit occurred on October 6, 1942, and was prior to the ninety day period in which plaintiff was required by the bond to file proof of loss. The agent was informed as to the extent of the existing shortage and that the Bank had taken over and was liquidating the assets of the debtor coal company in the belief that the shortage would be ultimately wiped out. According to the testimony of plaintiff the defendant's agent agreed that the Bank should proceed with the liquidation, and that it need not file detailed proof of loss until the amount of such loss was finally determined. By this testimony, which the jury accepted, the defendant waived formal proof of debt until May 5, 1944.

True, this date was subsequent to the date when suit was filed, which was within the fifteen month period required by the bond, but the waiver as to formal proof of claim, and the confidential relations between the parties, as well as the failure of defendant to plead the alleged prematurity of the action as rquired by Rule 8(c) and Rule 12(h), Federal Rules of Civil Procedure 28 U.S.C.A. following section 723c, take the force from this objection to the pleading and make it appear merely technical. See New Amsterdam Casualty Co. v. Basic Building & Loan Association, 3 Cir., 60 F.2d 950; American Credit Indemnity Co. v.W. K. Mitchell & Co., 3 Cir., 78 F.2d 276.

The second reason for defendant's motion, failure to file proof of loss within ninety days after discovery of loss, is covered by the testimony of plaintiff as to the waiver which the court is bound to accept.

The third reason for defendant's motion is the alleged failure of plaintiff to rely upon the waiver of proof of claim. As evidence of this failure the defendent points to the failure of plaintiff to assert the waiver for two years and its assertion for the first time a few weeks prior to the trial date. Nevertheless it was admitted as part of the proof of plaintiff pursuant to the amendment of the claim and was in issue on the trial.

The fourth reason advanced by defendant was the application of the funds derived from liquidation of the Coal Company to overdrafts created between July 30 and August 14, 1942. It was alleged that the amounts were wrongfully deposited against the overdrafts of the Coal Company and not to the notes apparently secured by assignment of accounts. By the testimony of the plaintiff this action was taken with the knowledge and consent of defendant's agent, with the belief of all parties that the Bank would be kept from loss and the defendant from liability.

The plaintiff had the right to apply the fund to the unsecured claims. Arbuckles & Co. v. Chadwick, 146 Pa. 393, 23 A. 346.

The motion of defendant for judgment will be denied.

This case was originally tried before Judge Schoonmaker prior to his death.

Inclusion of Bonuses and Interest Rate to be Paid After Maturity of Note Held Not to Violate Statutory Provision

Raldne Realty Corporation v. Stern, Supreme Judicial Court of Massachusetts, 66 N. E. Rep. (2d) 717

In action to recover balance due on note where note is in evidence with defendant's signature thereon unchallenged, it is held that a prima facie case is made for the plaintiff.

Where defendant contends that recovery by plaintiff on note includes an excessive amount of interest and evidence shows that the note included substantial amounts as bonuses for the original loans and renewals thereof, and rate of interest stipulated in the note and prior notes was one and one-half per cent per month after maturity, it is held that such bonuses and rate of interest do not violate any statutory provision.

Action of contract by the Raldne Realty Corporation against Major L. Stern for the balance due on a note. Finding for plaintiff, and defendant brings exceptions. Exceptions overruled.

A. J. & J. A. Daly, of Boston, for plaintiff.

Friedman, Atherton, King & Turner, of Boston, for defendant.

RESCRIPT.—This action of contract to recover a balance upon a promissory note of the defendant payable to the plaintiff in the principal amount of $3,739.24 was tried in the Superior Court by a judge sitting without a jury. There was a finding for the plaintiff for $408.49. The judge refused to act upon or grant certain requests of the defendant and denied requests of the defendant that "upon all the evidence a finding for the plaintiff is not warranted" and "upon all the evidence a finding for the defendant is warranted." There was no error in the denial of these requests. The note, which was in evidence with the defendant's signature thereto unchallenged, made a prima facie case for the plaintiff. McDuffee v. Kelsey, 312 Mass. 458, 460, 45 N. E. 2d 258. While there was evidence that a substantial amount was paid upon the note, the evidence did not warrant a finding that it was fully paid.

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § 1565.

The defendant, however, included in his answer the allegation "by way of equitable defence that the enforcement of the plaintiff's claim and demand against him would be grossly unfair, unconscionable and violative of all principles of equity and good conscience." This is the sole defence relied upon by the defendant. But the evidence not only did not require a ruling that this defence was established but did not warrant such a finding. The defendant's contention in substance is that, if the plaintiff should recover in this action, it would recover an excessive amount of interest. There was evidence that the note included substantial amounts as bonuses for the loans originally made and for renewals thereof. The rate of interest stipulated in the note and in prior notes was one and one half per cent per month after maturity. Such bonuses and this rate of interest did not violate any statutory provision. Compare G. L. (Ter. Ed.) c 140, §§ 90, 96-110, as amended. And there was no evidence that the defendant was not of full capacity or that there was any confidential relation between the parties to the note and no evidence that any fraud was practised upon the defendant by the plaintiff. Although it may well be that the transaction was improvident on the part of the defendant—that it was a hard bargain—no sufficient reason is shown for relieving the defendant from his bargain and from liability upon the note in accordance with its terms. See Spofford v. State Loan Co., 208 Mass. 84, 88, 94 N. E. 287; Goodwin v. Agassiz, 283 Mass. 358, 363, 186 N. E. 659. There was no error in the refusal of the judge to act upon other requests of the defendant—which are requests for findings of fact. Ashapa v. Reed, 280 Mass. 514, 516, 182 N. E. 859. Memishian v. Phipps, 311 Mass. 521, 523, 42 N. E. 2d 277.

Exceptions overruled.

Bank Obliged to Ascertain Authority of Trustee to Endorse Note

Peoples Savings Bank of Greenville v. Foureman, Court of Appeals of Ohio, 66 N. E. Rep. (2d) 282

Bank as endorsee of promissory note endorsed to it by one signing as trustee for the named payee of note is obligated to learn the authority and power of the trustee to take the note and to make the indorsement. Evidence in instant case was sufficient to establish trustee's authority to transfer and indorse note payable to payee and verdict for plaintiff bank was affirmed.

NOTE—For similar decisions see B. L. J. Digest (Fifth Edition) § 682.

Action by the Peoples Savings Bank of Greenville, Ohio, against Alonzo Foureman, as guardian of Allen Foureman, to recover on a promissory note payable to the order of Allen Foureman and endorsed to plaintiff bank by C. Foureman, trustee of Allen Foureman. From a judgment entered on a directed verdict in favor of plaintiff, defendant appeals.

Judgment affirmed.

George W. Porter, of Greenville, for plaintiff-appellee.

Walter F. Rhynard, of Greenville, for defendant-appellant.

HORNBECK, P. J.—This is an appeal from a money judgment in favor of plaintiff by a jury upon a directed verdict after the submission of the evidence of both parties upon trial of the cause.

Plaintiff's action was upon a promissory note dated December 13, 1930, payable to the order of Allen Foureman of Greenville, Ohio, for the sum of $91.30, signed by W. E. Albright and endorsed to plaintiff bank by C. Foureman, trustee of Allen Foureman.

The issue joined raised the question of the legal right of the plaintiff to maintain its action on the note under the facts and particularly upon endorsement of C. Foureman, trustee of Allen Foureman who on the date that the note was given, was acting as trustee of Allen Foureman under a trust deed made by Allen Foureman to said Cornelius Foureman.

The defendant by answer set up several defenses, the effect of all of which was to question the validity of the note and particularly its ownership under the endorsement appearing thereon. The trial judge directed a verdict and the motion for new trial and the assignment of errors raise substantially the same questions as set up in the answer of defendant, all of which go to the ultimate question of the right of the bank to maintain its action on the note under the facts appearing.

We are of opinion that there is but one legal question of consequence presented, namely, the right of the trustee to sell the personal property for the purchase price of which the note in question was given and to take the note therefor instead of cash. The plaintiff bank was obligated to learn the authority and power of the trustee to take the note and to make the endorsement. Holmes, Booth & Hayden v. Hayes, 52 Ohio St. 617, 44 N.E. 1138; Stone v. Davenport, 7 Ohio Dec. Reprint 83; Mutual Mfg. Co. v. Divine, 21 Ohio Dec. 802; Anglo-South American Bank v. Star Drilling Machine Co., 20 Ohio Dec. 200.

By the terms of the trust instrument, it fairly appears that Allen Foureman transferred the legal title to real estate and personal property, therein described, to Alonzo Foureman for the purpose of paying the creditors of Allen Foureman and to accomplish this the trustee was given absolute control of the property during the life of the trust and to administer the property so as to accomplish the

purposes of the trust. It is obvious that the trustee was given power to sell either privately or by vendue the personal property if thereby he could better assure the payment of the creditors of the maker of the trust. Ordinarily it may be said, that if an instrument is silent as to the manner of sale whether cash or on credit that it shall be made for cash. American Law Institute, Restatement of the Law of Agency, § 70. However, here was an instrument authorizing the management, control and sale of farm property which was sold at public auction. It is testified and undenied that it was customary practice at such sales to accept notes for the purchase price of personal property. It is probable then, that by implication, this instrument authorized such a form of sale which was in accord with the business practice of the vicinity in which the sale was conducted.

Under all the circumstances appearing and in the light of the trust instrument, we are not prepared to say that the trial judge held erroneously on this determinative question.

The judgment will be affirmed.

TRUST and TAX DIGEST

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THE BANKING LAW JOURNAL, Cambridge, Mass.

TRUST DECISIONS

Digest of current decisions pertaining to the law of trusts, wills, estates, descent, distribution and corporate fiduciaries

Agreement in Trust Indenture Enforced

Hackensack Trust Co. v. Ackerman, Court of Chancery of New Jersey, 47 Atl. Rep. (2d) 332

Decedent in her lifetime executed a trust agreement wherein she covenanted that she would will to the trustee therein a one-ninth part of her residuary estate for the benefit of L. P. W. She executed a will which was duly probated, but in it she failed to bequeath or devise the one-ninth of her estate to her trustee as provided in her trust indenture; but in her will bequeathed and devised the same to L. P. W. It was held that the agreement in the trust indenture will be enforced and a resulting trust will be imposed. The court was inclined to believe that a mistake was made by the scrivener of decedent's will. That trust deed was under seal was presumptive evidence of consideration. The law of this state is well settled that an agreement to make a will is enforceable.

Application of "Cy Pres" Doctrine of Charitable Trusts

First Trust Co. of Lincoln v. Thompson, Supreme Court of Nebraska, 23 N. W. Rep. (2d) 339

Where a definite charitable trust is created, the failure of the particular mode by which its dominant purpose is to be effected will not defeat the charity, but under such circumstances a court of equity will, under the judicial cy pres doctrine, substitute another mode if it may be done within the scope of the donor's dominant purpose.

In the instant case grantor by deed conveyed in trust to trustees bonds of the Pan-American Railroad Company of the face value of $800,000. The purpose of the trust as disclosed by the deed was "for the use, foundation, establishment, and acquisition of suitable grounds, buildings and equipment and the operation and maintenance of a home for homeless children within the State of Nebraska." The bonds remained at less than ten cents on the dollar, and prove insufficient to accomplish grantor's purpose. On application of the trustees, court

substituted one of three existing orphanages as recipient of the funds. Such substitution was held to be in the court's sound judicial discretion. Institution which accepted orphans without regard to age, sex, nationality, or color, and which provided for proper care in the institution, was properly eligible for assignment of proceeds of sale of trust res.

Bequests Liable For Their Own Inheritance Tax in Settlement of Estate

Dewart's Petition, Orphan's Court, Pennsylvania

Testatrix made the following provision in her will: "I order and direct that inheritance and other taxes incident to the settlement of my estate be paid by my estate." The court was of the opinion that this item in the will of the testatrix is nothing more than the ordinary stereotyped and familiar clause found in so many wills directing all inheritance taxes to be paid and when the testatrix said "by my estate" without any directions as to what estate should be ulimately charged, her intention as to the payment of inheritance tax was not expressed in language that was free from doubt. The position of the attempted tax-free clause, following the individual devices and bequests, but preceding the residuary clause, invites the conclusion that what the testatrix had in mind was that the specific bequests should be liable for their own tax. The court distinguished Anderson's Estate, 312 Pa. 180, where the will expressly charged the payment of death taxes to residue.

Foreign Will Ineffective as to Local Real Estate

In re Winter's Estate, Orphans' Court of New Jersey, 47 Atl. Rep. (2d) 545

Herman Winter formerly lived in New Jersey and while a resident of this state, he executed a will in due form to pass title to real estate situate in this state. At the time of the execution of the will, he was unmarried, but later he married and went to Arizona where he was domiciled when he died. His widow is also of that state and his mother is a resident of New Jersey. He had no children, brothers, or sisters. While in Arizona, Herman Winter made a holographic will in which he attempted to dispose of all his estate, real and personal. This instrument also recited: "I hereby revoke all wills and testamentary instruments by me at any time heretofore made." This Arizona instrument was not witnessed, but being holographic was duly executed under the laws of Arizona and has been admitted to probate in that state. There is no statute in Arizona affecting wills of married persons. New

Jersey law permits the probate of wills of non-residents on certain conditions. One condition is that the non-resident shall die "seized of real estate situate in this state leaving a last will and testament executed in due form to pass title to real estate situate in this state." The testator did die seized of real estate in New Jersey. The earlier will is now submitted for probate in New Jersey.

The court found that the will of Herman Winter, executed in New Jersey, is his last will and testament executed in due form to pass title to real estate situate in this state; that decedent died seized of real estate in this state and the said will has not been probate in any other state or country nor offered for probate, and that no proceedings for probate are pending in any other state or country. The will, therefore, was admitted to probate. The attempted revocation in the Arizona will, either implied or express, cannot affect New Jersey real estate. The inconsistency must be a legal inconsistency and the attempted revocation in Arizona is a legal nullity as to New Jersey real estate. Since the New Jersey will is the only legal will affecting real estate in this state, and is unrevoked as such, it is the only last will of real estate which the state will recognize and thus is written the terms of the statute. The fact that the Arizona will has been probated in Arizona does not affect the New Jersey will since one of the conditions of the statute is that the New Jersey will shall not have been probated elsewhere.

Inactive Trust Terminated on Petition of Beneficiary

In re Decker's Estate, Supreme Court of Pennsylvania, 46 Atl. Rep. (2d) 218

John K. Decker, unmarried, died testate on April 24, 1940. He willed the residue of his estate to his nephew, Glenn Decker, then about 26 years of age. The residuary clause of the will reads as follows: "The said property, real and personal to be held in trust, however, and the income therefrom to be turned over to Glenn Decker at periodic intervals. Said trust to continue until Glenn Decker reaches the age of forty years and at that time, the said property is to be turned over to my said nephew, Glenn Decker, absolute."

Glenn Decker instituted proceedings to terminate the trust and to deliver the corpus thereof to him on the grounds that the trust is both vested, and dry, and that the postponement of possession until the cestui que trust reached the age of forty years is invalid and void. The trustee neither joined in the petition nor opposed it.

The opinion of the court in which numerous Pennsylvania cases were reviewed, is quoted below in part: "If the testator believed that

his nephew would squander or dissipate the principal of the trust, he had it within his power to create a spendthrift trust. This he did not do. The law of this Commonwealth treats a trust like the one before us exactly as if the testator had willed the property directly to the donee, making him the sole owner of it, by providing that the donee should receive the income, but should not use the principal until he attained a certain age. In such a situation the law is that the donee is entitled to the full enjoyment of the legacy at once. It is the policy of this Commonwealth, as declared in a long line of decisions to treat a legacy like the one now before us as an absolute gift to the donee, and that means, of course, that he has the right to the immediate possession of it upon demand. This policy so long adhered to has become with us a rule of law affecting the devolution of property. As we said in Smith v. Glen Alden Coal Co., 32. Atl. (2d) 227, 234: "A rule of property long acquiesced in should not be overthrown except for compelling reasons of public policy or the imperative demands of justice." The record in this case presents no such compelling reasons for the overthrow of this long-regnant rule nor does justice imperatively demand it.

Removal of Trustee of Charitable Trust by Attorney General

In re Grbiny's Estate, Supreme Court of Nebraska, 22 N. W. Rep. (2d) 488

The Attorney General is a proper party plaintiff and has the right and power to maintain a proceeding under statute for the removal of a trustee of a charitable trust for neglect or failure to give bond as required by statute. The powers conferred upon a trustee of a charitable trust can properly be excercised by his successors, unless it is otherwise provided by the terms of the trust.

Meaning of Word "Securities" as Authorized Investment in Trust Account

In re Astor's Estate, Surrogate's Court of New York, 62 N. Y. Supp. (2d) 117.

In this accounting proceeding a construction is necessary to determine the meaning of article fifteenth of the will wherein deceased gave authority for investments by his trustees in this language: "I authorize my Executors and the Trustees named in this Will to invest all or any of the funds held by them in trust on Bond and Mortgage in the public debt and Securities of the United States of the States of New York, New Jersey, Pennsylvania, Massachusetts and Ohio on first mortgage bonds of any Railroad in the United States in the public debt of

any of the Cities of the United States approved of by all the acting Trustees for the time being of any of the trusts in this Will contained and in any other securities which shall be approved of by all the Trustees of any trust for the time being and by the then beneficiaries of the trust who shall be of full age."

Deceased died in 1892. He had executed his will in 1882 and in 1891 the last of several codicils thereto. The question presented is whether or not the word "securities" used in a will prepared in 1882 has a connotation sufficiently broad to cover the investments now reported by the trustees. These include certain debentures and certain interest bearing certificates and also an issue of town bonds.

It was held that the word "securities" in our current usage includes stocks and bonds. Restatement of the Laws of Trusts, Vol. 1, § 227, p. 657; Rosenthal v. Brown, 247 N. Y. 479, 160 N. E. 921. Not only in the mercantile but in the general business and investment field the word "security" in our usage has lost the restricted meaning which it once had. At the date of the last of the codicils executed by deceased it clearly had a meaning sufficiently broad to include the type of investments now in the hands of the trustees. Hence it is proper in the circumstances to construe the will of deceased as authorizing the type of investment held by the trustees unless something else in the text requires the application to the word of a restrictive meaning.

Provision in Trust Violative of Rule Against Perpetuities

In re Yeager's Estate, Supreme Court of Pennsylvania, 47 Atl. Rep. (2d) 813

In creating a trust, testator provided that "At the death or dissolution of any beneficiary their or its share of the proceeds of this fund shall be allocated to the remaining beneficiaries share and share alike or if any of the blood relatives of the beneficiaries named in this will are actually in need of financial assistance through sickness or misfortune, decedent's portion of their assignment as set forth may be applied to the relief of such person or persons at the discretion of the trustee."

It was held that this provision violated the rule against perpetuities. It extends the discretionary power given to the trustee for the entire life of the trust and beyond the period prohibited by the rule. Probability that the future interest will vest within the period is not enough. If, at the creation of the interest, by any circumstance or happening it is a possibility that it may not vest within the lawful period, the rule is operative and the interest destroyed. It is not a rule of construction, but a positive mandate of law to be obeyed irrespective of the question of intention.

Revocation of An "Irrevocable" Will

New York Law Journal, July 31, 1946

It is a general rule that probate of a propounded instrument cannot be denied on the ground that the decedent bound himself by agreement to dispose of his estate in a manner differing from the disposition made by the terms of the writing, or that the later will revoked an earlier will which was drawn pursuant to agreement (Hermann v. Ludwig, 186 App. Div., 287, 174 N.Y.S., 469; Kine v. Farrell, 71 App. Div., 219, 75 N.Y.S., 542; Morgan v. Sanborn, 225 N. Y. 454, 122 N.E. 696; Matter of Hermann, 178 App. Div., 182, 165 N.Y.S., 298 aff'd 222 N.Y., 564, 118 N.E., 1062; Matter of Lally, 210 App.Div., 757, 206 N.Y.S., 690).

A person may bind himself by an agreement which in form is a contract to make an irrevocable will, or to dispose of his estate in a particular manner, but the instrument executed pursuant thereto is nevertheless revocable as a will (Morgan v. Sanborn, 225 N.Y., 454, 122 N.E., 696; Matter of Gloucester, 32 St. Rep., 901, 11 N.Y.S., 899).

In such instances the court does not set the earlier will aside, but holds the executor, devisee or legatee, as the case may be, as trustee for the performance of the decedent's contract (Phalen v. U. S. Trust Co., 186 N.Y., 178, 78 N.E., 943; Hermann v. Ludwig, 186 App. Div., 287, 174 N.Y.S., 469; Adams v. Swift, 169 App. Div., 802, 155 N.Y.S., 873). The basis for the rule is that, as a will, the instrument is revocable at pleasure, but as a contract, if supported by adequate consideration, it is enforcible as such in equity (Rastetter v. Hoenninger, 214 N.Y., 66, 108 N.E., 210; Matter of Hermann, 178 App. Div., 182, 165 N.Y.S., 298, aff'd 222 N. Y., 564, 118 N.E., 1062; Matter of Lally, 210 App. Div., 757, 206 N.Y.S., 690).

In Matter of Lamardin (157 Misc., 434, aff'd 247 App. Div., 887, 288 N. Y.S., 765) the decedent died on August 19, 1935, survived by her husband, two sisters and three brothers as her sole distributees. A testamentary instrument which recited that it had been executed by her on May 24, 1922, was offered for probate.

Objecting to the probate, the husband of the decedent alleged that he and the testatrix, having in mind the possibility of a common and fatal accident on an intended trip to Europe, agreed to execute mutual wills, under the provisions of which their respective estates would go to their "respective heirs and beneficiaries." These wills were not to be effective after a safe return from the trip which was in prospect. The husband further alleged that upon his return from Europe he revoked his will in accordance with the agreement, but that his wife executed the propounded instrument at the direction of her brother. The objecting husband concluded that to permit probate of the pro-

pounded instrument would be in violation of the agreement between the decedent and himself and would perpetrate a fraud; that he was entitled in equity to have the agreement referred to performed on the part of the decedent.

Granting a motion to strike out the objections, Surrogate Hetherington of Queens County said (p. 434 of 157 Misc.):

The right of the objector to interpose the agreement pleaded as a valid objection to probate has frequently and recently been denied (Matter of Higgins, 148 Misc., 30, 266 N.Y.S., 503, aff'd 234 N.Y., 226, 190 N. E., 417). The surrogate has no power in this proceeding to give any effect whatever to the contract. . . . Although it was formerly held that the right to esablish and enforce an agreement of the character he alleged could only be determined by the Supreme Court in an action in equity (Matter of Hermann, 178 App. Div., 182, 165 N. Y. S., 298 aff'd 222 N.Y., 564, 118 N.E., 1062), the modern view takes notice of the increased equitable jurisdiction of the court and holds that it is no longer incumbent upon the surrogate to refer the parties to equity for the protection and enforcement of their rights (Matter of Higgins, supra; Matter of Lally, 210 App. Div. 757, 206 N. Y. S., 690; Matter of Rosenblath, 143 Misc., 640, 257 N. Y. S., 856; id., 146 Misc., 424, 263, N. Y. S., 303, aff'd 240 App. Div., 846, 266 N. Y. S., 1015; Matter of Razoux, 154 Misc., 128, 276 N. Y. S., 782). Objector's rights under the contract may be established and enforced either in an independent proceeding or upon an accounting.

Reservation of Reversion in Settlor of Trust

Rachel Scholtz v. Central Hanover Bank & Trust Co., N. Y. Court of Appeals, N. Y. Law Journal, Vol. 116, No. 43

A settlor has power to revoke, with the consent of her son, a trust created by a deed in which she directed that the income of the trust be paid to the son during his life and that on his death the principal be paid to his descendants and, if he left no descendants him surviving, to the settlor's next of kin under the laws of New York at the time of the son's death. The direction to transfer the principal to the settlor's next of kin had the effect of reserving a reversion in the settlor and not of creating a remainder. The reservation of a reversion is not inconsistent with the creation of a trust to continue until the death of the reversioner.

TAX DECISIONS

Digest of current decisions pertaining to the law of taxes on trusts, estates and gifts

Decedent's Contribution to Two Trusts Held Taxable Because of Possibility of Reverter

Beach v. Collector, U. S. Circuit Court of Appeals, Sixth Circuit, No. 10210

In 1925 and 1926, decedent and his wife contributed to two trusts, the income of which was payable to his wife and a daughter for life. On the death of the surviving life beneficiary, the trusts were to terminate, with distribution of principal, according to the statutes of descent and distribution, to the common heirs of decedent and his wife. The court, forseeing the possibility of reversion to decedent, if he survived the life beneficiaries, held his contribution taxable as a transfer effective at death.

Estate Tax on Contingent Power to Revoke

Trust Company of Georgia v. Collector, U. S. District Court, Georgia, Civil Action No. 243

In 1930, decedent created a trust, reserving a life income coupled with a power of revocation exercisable upon arriving at the age of 40 years. Provision was made for distribution to others in the event that decedent was not survived by a wife or lawful children. Subsequently, decedent entered into a property settlement agreement made part of a decree of divorce, whereby he provided for payment of one-third of the trust income to or for the benefit of his wife and son. In the event that decedent would exercise his power of revocation, one-third of the corpus was to be delivered to or for the benefit of the wife and son. Where decedent died prior to reaching the age of 40 and was survived by the divorced wife and son, the transfer was taxable as one to take effect at death. The reservation of the contingent right to revoke rendered acquisition of the property by the beneficiaries incomplete so long as decedent lived. Where the right in the divorced wife and son to one-third of the income was destroyed at decedent's death, according to a state court decree, no deduction therefor is allowable in valuing the property. As stated in Fidelity Company v. Rothensies, 324 U. S. 108,

it is not proper that "the measure of the tax depend upon conjectures as to the propinquity or certainty of the decedent's reversionary interests. It is enough if he retains some contingent interest in the proprty until his death or thereafter, delayinng until then the ripening of full dominion over the property to the beneficiaries."

Deduction for Charitable Remainder Disallowed Because of Possibility of Invasion

Estate of Edward Martin v. Collector, U. S. District Court, Penn., Civil Action No. 4311

Decedent created a testamentary trust, with remainders payable to charity on termination of intervening life estates. The trustees, "in their uncontrolled discretion" were authorized to exhaust the principal "for the comfort and support" of the life beneficiaries, if they "deemed the income inadequate." Taxpayers contended that controlling state law, and their own circumstances, imposed fixed standards on the trustees in the exercise of their discretion, and that consequently substantial invasion of principal was unlikely. The court, however, concluded that it was not testator's intention to limit his beneficiaries to any rigid standard of living, and held the remainder interest not deductible, since its value could not be ascertained with any degree of accuracy.

Estate Tax on Life Insurance-Annuity Combination

Burr v. Commissioner, U. S. Circuit Court of Appeals, Second Circuit, No. 133

Decedent purchased a life insurance-annuity combination. He, then, assigned the life policies to the named beneficiaries, so that they were given rights to assign the policies, in turn, surrender them for cash, and receive dividends thereon. It is held that the assignments did not create sufficient property rights in the beneficiaries to take the case outside of the scope of Helvering v. LeGierse, 312 U. S. 531, and that the insurance proceeds, therefore, are taxable as the subject of transfers with life income retained.

When the decedent in this case transferred $107,500 to the insurance company, he obtained from it two promises: one to pay him a small rate of return in the form of monthly annuity payments, the other to transfer $100,000 to the named beneficiaries on his death. His annuity payments represented a fixed percentage of the total consideration; and the company's investment risk was so calculated as never to exceed the expected income from the premiums on the insurance and the annuities. No matter who held the policy and the annuity, the two

contracts, relating to the life of the one to whom they were originally issued, still counteracted each other. In assigning the policies, he was, in effect, transferring a remainder while retaining a life interest or —in the terms of the statute—retaining the enjoyment or the right to the income from the property. Had the sons actually cashed the insurance policies, the contracts would have been separated and the insurance company would then have had to make annuity payments out of income and capital from the annuity premium. But they chose not to surrender them; and the unexercised power to do so did not change the factual realities of the transaction. While the power was unexercised, the investment was analogous to a simple annuity with principal payable at death, a transfer which—even when irrevocable—is taxable under § 811(c).

Estate Tax Deductions of Future Payments to Decedent's Divorced Wife

Commissioner v. Marjorie D. Maresi, U. S. Circuit Court of Appeals, Second Circuit, No. 302

Under the provision in section 812 of the Internal Revenue Code relating to deductions from the value of a decedent's gross estate for the purpose of the estate tax, a deduction is allowable for a claim of a decedent's divorced wife for future payments due to her until her death or remarriage which were provided for in a separation agreement incorporated in the decree of divorce. Her claim is based on the divorce decree and not on the separation agreement. The allowance of a deduction for the claim is, therefore, not subject to the provisions in the statute that the deduction for a claim "founded upon a promise or agreement" shall be limited to the extent that it was contracted for a consideration in "money or money's worth" and that a relinquishment of marital rights in a decedent's property or estate shall not be deemed a consideration in money or money's worth.

Consequently, the case is not within the rule that a claim of a decedent's for sums payable in whole or in part at or after his death, which is based on an agreement made in consideration of her relinquishment of her right to support during his life, is not deductible from the gross estate. In order to fix the commuted value of the future payments, as determined by, among other things, the expectancy of continued celibacy of the decedent's divorced wife, it was proper for the court to make use of actuarial tables, based on American experience as to the remarriage of widows entitled to workmen's compensation, which were prepared by an actuarial organization and supported by the testimony of an actuary of standing. The difference in factors was

not a sufficient reason rejecting the tables when they were offered by the taxpayer; if either the government or the taxpayer suffered from their use, the chances are that it was the taxpayer.

Gift Taxes on Agreements Incident to Divorce or Separation

Estate Tax Ruling 19

Transfers of property pursuant to an agreement incident to divorce or legal separation are not made for an adequate and full consideration in money or money's worth to the extent that they are made in consideration of a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or other marital rights in the transferor's property or estate; to the extent that the transfers are made in satisfaction of support rights the transfers are held to be for an adequate and full consideration. The value of relinquished support rights shall be ascertained on the basis of the facts and circumstances of each individual case.

No Gift Tax on Discharge of Obligation

Seaman v. The United States of America, U. S. Circuit Court of Appeals, Seventh Circuit, Nos. 8787, 8991, 8992

Harold H. Seaman and Irving Seaman as legatees under the will of their mother, Kate D. Seaman, received 12,602 shares of stock, but on condition that they permit payment of the dividends to their sister, Lauretta A. Seaman, for life or, in the event they should sell the stock, that they pay her during the remainder of her life the equivalent of such dividends amounting to $1.00 per share or $12,602 per year. The brothers elected to sell the stock and in order to discharge the $12,602 annual obligation to their sister, they purchased annuities providing for an income equal to the dividends. The cost of the annuities, plus a small sum in cash paid pending their issuance amounted to about $182,400. At the time of the transaction, the value of the sister's life interest in the stock was only about $68,800.

It was held that the difference between the value of the sister's life interest in the dividends and cost of the annuities, plus the cash, did not constitute a taxable gift. The sale of the stock was an undenied right belonging to them as legatees under a will. Upon the sale of the stock they satisfied their obligation to Lauretta by the medium of annuity contracts, and the proceeds from the sale of the stock could not be

measured as consideration for the annuities payable to the sister, because the brothers owned the stock. Hence, there was no error with regard to the findings of the District Court that there was no gift and that the purchase of annuity conracts was not motivated by any donative intent.

Currently Distributable Income of Testamentary Trust

Emily B. Harrison v. Commissioner, U. S. Tax Court, 7 T.C. No. 1

Petitioner was a beneficiary of currently distributable income of a testamentary trust. In 1940, pusuant to Orphans' Court adjudication of that year, petitioner received as income-beneficiary a share of a down payment on the purchase price of trust real estate forfeited as liquidated damages. The forfeiture occurred in 1937 and the down payment was carried on the trust books as corpus until 1940. In the latter year it was decreed by such Court to be income of the trust and distributable as such. Petitioner received her share of such distribution in that year. It was held that the distribution so received is taxable to petitioner in 1940. Petitioner was under no duty to report her share of such income for tax purposes until the obstacle of the legal controversy, which prevented her from receiving it, was removed.

Tax Deductibility of Claims of Divorced Wife

Commissioner v. Estate of Angus O. Swink, U. S. Circuit Court of Appeals, Fourth Circuit, No. 5465

A property settlement agreement, made part of a divorce decree, provided that decedent pay his wife alimony and, if he should predecease her, his executors were to purchase an annuity for her. In addition, decedent was to purchase a residence for her within three years from the date of the agreement. Thereafter, in December, 1940, decedent's divorced wife instituted a suit for alienation of affections against his new wife. The suit was dismissed upon decedent's promise to pay his former wife $25,000, payable after his death. To secure payment, decedent took out a policy of insurance on his life.

It is held that payments by decedent's executors to purchase the annuity and home for the divorced wife were founded upon the divorce decree and are deductible as claims against the estate, under Code Sec. 812 (b)(3). However, payment by the executors of the amount decedent had agreed to pay in settlement of the suit for alienation of affections was founded upon an agreement and the amount so paid is not deductible, in the absence of proof that the agreement was contracted for an adequate consideration in money or money's worth.

Power to Invade Corpus for Life Beneficiaries

Estate of Edward Martin v. Collector, U. S. District Court, Penn., Civil Action No. 4311

Decedent's will created a trust, the income to be paid to three designated beneficiaries—cousins of his wife—during their lives, remainder to charities. The trustees were given power to invade the principal of the trust, in their uncontrolled discretion, as would be necessary for their "comfort and support" if the trustees should deem the income inadequate for the purpose. The trustees could exhaust the entire principal if they deemed it necessary.

It was held that the extent of permissible invasion of the corpus of the trust cannot be reliably predicted and no "highly reliable" appraisal of the amount the charities will receive, is available. No deduction, therefore, was allowable on account of the remainder to charity. The court said that it would be difficult to predict a continuance of a modest standard of living by the beneficiaries since most of their expenses had previously been paid out of modest salary incomes.

Taxability of Payment to Estate of Deceased Partner

Raymond S. Wilkins v. Commissioner, U. S. Tax Court, 7 T. C. No. 63

In the taxable year petitioner was one of the surviving partners of a law partnership. The partnership agreement provided that upon any partner's decease his estate would be entitled to a payment, within one year, equal to one-fourth of the amounts distributed to the deceased during the two years preceding his death. The firm had no capital assets in the strict sense, and it was expressly provided that the firm should not be deemed to possess any good will. A majority of surviving partners who continued in business were to have the right to use the books, typewriter, office supplies, and other incidentals. All the partners had always considered that upon their death or retirement their rights would be limited to their share of earned but uncollected fees, and they interpreted the partnership agreement as providing a convenient rule of thumb for ascertaining or approximating the amount thereof.

It was held that the deceased partner's estate was not a partner in the continuing or successor firm and had no right to a share of partnership income, as such. It was held further that the petitioner is taxable upon his distributive share of partnership income, without any deduction for payment to the estate, in the absence of a showing as to what amounts of the fees in which the deceased had an interest were collected in the taxable year.

Tax Deduction of Trust Income Paid to Charitable Corporation

John E. Andrus Trust v. Commissioner, U. S. Tax Court, 7 T. C. No. 70

Where trustees paid or permanently set aside 45 per cent of the income of the trust to a charitable corporation in accordance with the instrument creating the trust, it was held that the entire amount so paid or set aside is deductible under section 162(a) Internal Revenue Code, in computing the net taxable income of the trust, even though a large part of the trust income consisted of long term capital gains. Old Colony Trust Co., 301 U. S. 379; Charles F. Grey, 41 B. T. A. 234, distinguished.

Taxability of Reversionary Interest in Grantor

Amory S. Carhart v. Commissioner, U. S. Tax Court, T. C. Memo. Docket No. 6643

Taxpayer created a trust for each of his two minor children and retained the right to receive the trust corpus upon termination of either of the trusts, terms of which were fixed to extend for less than 9 and 14 years respectively. It was held that the extent of the taxpayer's retained interest in view of all the circumstances including the ultimate return to him of the corpus, the intermediate term of the trusts, the relationship to him of the beneficiaries, and his continued possession of all phases of management and control, bring the present trusts within the primary and original phase of the strict Clifford doctrine.

Trust Corpus Included in Decedent's Gross Estate

The National City Bank of New York, as Trustee v. Commissioner, U. S. Tax Court, 7 T. C. No. 60

Decedent in 1921, 1924 and 1925 conveyed certain property to three irrevocable trusts, reserving to himself and his wife the income for life with income payable upon his death and the death of his wife to his daughter and upon her death to his grandson. The trusts were to continue for the lives of his daughter and his grandson, and the trusts provided that upon their termination, if he were still living, the corpus should revert to decedent; but in case decedent or his wife did not survive the daughter and grandson, the trust corpus was to be paid to the children of the said grandson then surviving; but if said grandson left no child then surviving, the corpus was to be paid to the four nieces of decedent's wife in equal shares.

It was held that the facts show a survivorship case and the value of the corpora of the three trusts at decedent's death is includible in decedent's gross estate under section 811 (c), Internal Revenue Code. Estate of John C. Duncan, 6 T. C. 84 followed.

Taxability of Grantor

Ralph W. Conant v. Commissioner, U. S. Tax Court, 7 T. C. No. 57

In 1939 petitioner established four trusts and named his wife principal beneficiary in each. He transferred to the four trusts a life insurance policy on his own life and shares of stock in a corporation some of which shares were pledged to secure petitioner's personal indebtedness. In the taxable years 1940 and 1941, the Trustee, upon the direction of the primary beneficiary, paid the premiums on the insurance policy and also paid off the indebtedness. Each trust invested the wife with power "to cancel or revoke this trust at any time, in whole or in part," and in the event of such cancellation or revocation it was the duty of the Trustees to pay to the wife the principal and undistributed income "free and discharged of all trusts." It was held that the income of the four trusts is not taxable to petitioner with the exception of that part of the income representing the dividends on the pledged stock.

INVESTMENT AND FINANCE

Edited by OSCAR LASDON

Bank Capital Ratios

IN its annual report for 1945, the Federal Deposit Insurance Corporation reviews the problem of bank capital ratios. Traditionally, until recent years, banks were expected to maintain their capital and surplus at a level roughly equivalent to 10 per cent of total assets. However, the FDIC report maintains that enforcement of such a ratio would be unwise at this time. In support of this view, it notes the fact that the increase in bank assets over the past few years has occurred largely in the non-risk category.

Attention is also directed to the fact that loans, over the next few years, are unlikely to assume their pre-war relationship to total assets. Accordingly, it is contended, a ratio "substantially below" 10 per cent seems acceptable for the time being.

As a positive suggestion, the report voices the opinion that the current 5 to 6 per cent average ratio of capital to total assets of all commercial banks "seems relevant." Nevertheless, to safeguard against a decline in the ratio below this level, the FDIC specifically proposes that:

1. Retirement of preferred shares should not be permitted where banks' capital ratios are below the current average—unless there is a corresponding increase in common capital.

2. Capital ratios should be "in line with anticipated future asset volume" in the case of banks applying for deposit insurance.

3. Where operating banks have sub-standard capital ratios, they should be urged "by every means" to add to their capital accounts.

4. Restrictions must be placed on the licensing of new institutions. Banks should not be permitted to start operations when the amount of their capital "promises to result in a capital ratio below the general level of the capital ratios of other institutions in the same region."

The Deposit Insurance Corporation remarks that the nation's banks have experienced a downward trend in the ratio of total capital accounts to total assets for at least three-quarters of a century. In 1875, the ratio was 35 per cent. In 1895, it was 27 per cent. Twenty years later, in 1915, it was 18 per cent. By 1925, it had declined to 12 per cent, while, in 1939, it was 11 per cent. During the war, of course,

bank assets grew tremendously, and bank capital failed to keep pace with this growth. By the last year-end, the ratio had declined to 5.7 per cent.

The Corporation examines the argument, often advanced, that the decline in the capital ratio has been counterbalanced by a change in the character and quality of bank assets. It is critical of the contention that, instead of relying on the capital-asset ratio, emphasis should be placed on the ratio of bank capital to assets other than U. S. Government obligations and cash.

During the past five years, most of bank asset expansion went into cash and Government obligations. Assets other than cash and Government obligations increased in about the same proportion as bank capital. At the close of 1945, the ratio of bank capital to assets, other than U.S. Government obligations and cash, was 25 per cent. But, says the Deposit Corporation, this standard is not appropriate for the supervision of individual banks. Obviously, bankers may at any time convert a substantial proportion of their holdings of cash and Governments into other types of assets. Of course, the ratio would then decline.

So, because this latter ratio is subject to unreasonable flluctuations, it is unsuitable as a satisfactory standard for bank supervision. From another standpoint, it is inappropriate since it places a premium upon ultra-conservative banking. In this connection, it tends to encourage banks to freeze their resources in cash and Governments. And when such a freezing occurs, the banks are less able to satisfy the legitimate credit needs of their respective communities.

If banks are unable to satisfy legitimate credit needs, continues the FDIC report, it might become necessary for the Government to assume the responsibility for financing private enterprise. However, the FDIC wishes to see the banks so organized that they can meet the needs of their communities without recourse to Governmental assistance.

In summation, it is pointed out that the use of the ratio of capital to assets other than Government obligations and cash, as a standard, is faulty; it focuses attention upon only part of the qualitative picture with respect to total bank assets. Also, other types of bank assets vary significantly in quality. In addition, there are many non-measurable factors significant in determining risk of bank loss. Among these are the quality of bank management, economic situation of the community, as well as the character of the bank's clientele. No formula can be devised which will take into consideration all of these factors.

But irrespective of the quality of bank assets, capital is required to protect the depositor against unforeseeable losses. Bank capital is required as a cushion

against future asset depreciation. This is true no matter how high the quality of the assets. Consequently, there must be a uniform rule governing the volume of bank capital. And, as the report concludes, "The selection of a minimum ratio of capital to total assets provides a standard of capital adequacy that is familiar and can be applied without difficulty to all banks."

Low Interest Rates

Existing low interest rates are not an unmixed blessing. That is the opinion of Thomas I. Parkinson, President of the Equitable Life Assurance Society.

The taxpayer, according to Mr. Parkinson, thinks he is saving money because the Treasury is paying interest on its bonds at a low rate. But, the insurance official explains, the taxpayer is losing more than he gains because of the high prices he is forced to pay for everything he buys. The swollen money supply which makes possible low interest rates also is a leading cause of high prices.

Public officials frequently assert that the low interest rate reduces the cost of mortgages; that there are substantial savings to home owners and renters of housing by virtue of the saving in interest on the mortgage. However, it is pointed out, the mortgage interest is only a fraction of the increased cost of housing. Mr. Parkinson observes that "it really is not of much interest to the buyer or builder of a home that he can save 1 per cent on his mortgage interest when he is paying twice as much for the home as it would have cost in 1940. The housing situation is not helped much by the fact that the interest on the money borrowed to produce housing is 1 per cent less when the cost of the housing is at least 40 per cent more."

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Business Cycles

"Measuring Business Cycles," a study by Professor Burns and Mitchell under the auspices of the National Bureau of Economic Research, comes to the conclusion that the present era has not witnessed substantial alteration of the characteristics of business cycles. More specifically, it is stated

that there is small basis for the assumption that past history is currently valueless in appraising the outlook for cyclical fluctuations.

The study examines cyclical phenomena in this country and Great Britain since 1854. The duration of business cycles in France, since 1865, and in Germany, since 1879, are also reviewed.

Results of the study show that, in the United States, the average duration of the business cycle declined from sixty-one months in the earliest of the three subperiods (1854-85) to forty months in the second, and forty-two months in the most recent (1908-33).

However, within each period, the cycles varied greatly in duration. The shortest cycle in the first period lasted thirty months, the longest ninety-nine months. In the last period, the shortest cycle ran twenty-nine months from trough to trough, the longest sixty-three months. In the three other countries, it may be observed, the variations are similar, with little indication of secular decline in cycle duration.

There is a possibility, state the authors, that a change has taken place in the character of the business cycle since 1941. However, they note that there are not as yet a sufficient number of cyclical observations to establish such a result with confidence. Some evidence exists that cyclical fluctuations have intensified in this country, although evidence in this regard is also far from conclusive.

Stock Market Break

The recent severe break in equity prices cannot be ascribed to the Federal Reserve ruling prohibiting brokers from lending on securities, according to Shelly Pierce, financial editor of the *New York Journal of Commerce*. While this ban may have contributed to the thinness of the market and, in this respect, may have contributed to the severity of the decline, the basic causes of the write-down in values must be sought elsewhere.

Mr. Pierce notes that Federal Reserve authorities have not as yet indicated any relaxation of the ruling but feels that the change in the market picture would seem to justify alteration of the regulation at this point. The policy of the Federal Reserve Board governing margin requirements is determined by:

1. The volume of credit utilized to hold and carry securities.

2. The relative level of stock prices.

Security loans by banks and brokers are lower now than they have been in years, and a sharp increase is unlikely in the event that margin trading is permitted again. Furthermore, Mr. Pierce observes, stock prices are now lower than they have been since the summer of 1945, when margin

requirements were lifted from 50 to 75 per cent. Accordingly, as the status of the market is considerably different than it was when the 100 per cent margin rule was adopted, a modification now would appear to be in order. In addition, such action would assist in bringing about a resumption of new financing when stability is once more achieved in the market.

Taxes

Harley L. Lutz, Tax Foundation economist, states that federal expenditures for the 1947 fiscal year can be reduced from an estimated $41 billion to a level of $22 to $25 billion. In this connection, Dr. Lutz recommends:

"1. A halt in the expansion of Government created bank credit.

"2. Reductions in expenditures for national defense and veterans.

"3. Reduction in the number of civilian employes of the Government.

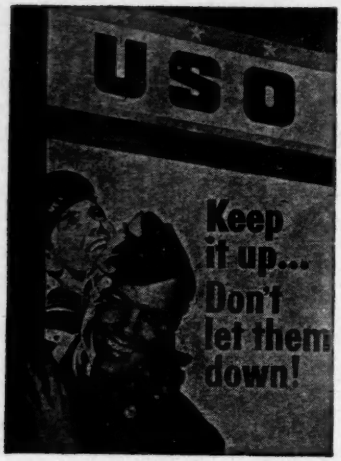
"4. Reductions in subsidies and grants."

Dr. Lutz observes that 80 per cent of the present budget is comprised of three items—expenditures for national defense, public debt interest, and veterans pensions and benefits. Dr. Lutz would cut defense expenditures from $16.5 billion to $7 or $8 billion and veterans pensions from $6.2 billion to $2 to $4 billion.

Treasury Finance

In the first nine months of this year, the Treasury has paid off almost $17.5 billion of maturing debt. Most of this has been in the form of certificates of indebtedness.

This policy has not been without effect on interest rates and the Government bond market. Short-term interest rates have stiffened slightly, member-banks purchasing of other than short-term Treasuries has slackened, while bank reserves have been reduced. Government bond prices are now near the low level of the year.



(Continued from page 722)

direction of further inflation of real estate prices, rising costs of construction, and more liberal extension of credit. The volume of mortgage debt on homes in this country may increase in the next two years to staggering proportions. Whether this volume of indebtedness, built up in a period of rising prices, high costs of construction and shortage of both materials and labor, can be sustained when the liquid assets of the public have been depleted by expenditures for goods of which they were deprived during the war, is a grave question of major fiscal importance.

It would seem to be the part of wisdom to discourage, rather than encourage, the expansion of this mortgage debt on homes in a period such as the one through which we are now passing; to urge the payment of debt and the conservative use of credit, reserving liquid resources to tide over any period that may lie ahead in which readjustments become necessary, rather than further extend debt and multiply purchasing power in a market starved for goods and glutted with funds.

The banker may be able to influence the point of view of the public in this connection. He may be able to induce the depositor and the prospective borrower to realize that the extension of unwise and unsound credit is as injurious to the borrower as it is to the lender.

In attempting to do so, however, he will be, in many instances, a lone voice in the wilderness. The popular theme today is one which emphasizes the high tenor of impending crisis and extravagant expenditure stimulated by further doses of credit as the cure. The warning counter-strains of cautions, of buying within the limits of probable income, of borrowing within the reasonable capacity to repay, and drowned out or subdued. They must be emphasized by some one: that seems to me to be the responsibility of the banker.

BANKING INFORMATION

In this department we present for the convenience of our subscribers a topical index to the current literature of banking—articles, books, pamphlets, speeches, etc.

AGRICULTURAL CREDIT

FARM MORTGAGE PITFALLS. By Jesse W. Tapp. Banking. August, 1946. P. 54.

HELPING A FARMER KEEP BOOKS. By Warren Garst. Banking. August, 1946. P. 52.

A MISSOURI BANKER SHOWS THEM BALANCED FARMING. By E. J. Evens. Burroughs Clearing House. August, 1946. P. 17.

AUTOMOTIVE INDUSTRY

Pamphlets

AUTOMOTIVE GOLDEN JUBILEE. Detroit: National Bank of Detroit. A brochure containing messages to the automotive industry from representative bankers and banking associations in all parts of the country. Contains a foreword by Walter S. McLucas, chairman of the National Bank of Detroit.

BANK ACCOUNTING

Articles

HOW A CONTINUOUS AUDIT HELPS OPERATING EFFICIENCY. By A. Breiner, Jr. Bankers Monthly. August, 1946. P. 374.

BANK BUILDINGS

Articles

DO YOUR BANK QUARTERS REFLECT THE QUALITY OF YOUR SERVICES? By A. A. Henkel. Mid-Continent Banker. August, 1946. P. 16.

BANK COSTS

Articles

MORE PROFITS IF YOU KNOW COSTS. By William C. Rempfer. Banking. August, 1946. P. 70.

YOUR BANK COSTS. By Harold E. Randall. National Auditgram. August, 1946. P. 80.

BANK CRIME

Articles

BANK ROBBERIES AND HOLDUPS INCREASE. Banking. August, 1946. P. 109.

HOW TO AVOID A HOLDUP. By J. R. Cudney. Bankers Monthly. August, 1946. P. 394.

BANK MANAGEMENT

Articles

THE PLACE OF THE BANK AUDITOR OR COMPTROLLER IN HIS BANK. By Frank L. King. National Auditgram. August, 1946. P 6.

BANK OPERATION

Articles

AIDING COMMERCIAL ACCOUNT TELLERS. By Henry J. Boone. Burroughs Clearing House. August, 1946. P. 22.

SHORT CUTS IN BANK OPERATIONS. By Oran S. Parker. National Auditgram. August, 1946. P. 35.

CHECKS

Articles

BANKS COMMENT ON CHECK ROUTING SYMBOL. Banking. August, 1946. P. 74.

TWO SUGGESTIONS FOR FOSTERING UNIFORMITY IN CHECK DESIGN. By Laurence K. Arthur. Bankers Monthly. August, 1946. P. 382.

CORRESPONDENT RELATIONS

Articles

MY BOSTON CORRESPONDENT. By Fred Copeland. Banking. August, 1946. P. 17.

COUNTRY BANKS

Articles

STREAMLINING COUNTRY BANK OPERATIONS. By B. P. Allen. Mid-Western Banekr. August, 1946. P. 10.

LOANS

Articles

FACTOR'S LIEN FINANCING. By J. Warren Olmstead. Banking. August, 1946. P. 47.

AN INTRODUCTION TO INVENTORY FINANCING UNDER THE FACTOR'S LIEN ACT. By J. Warren Olmstead. Bulletin Robert Morris Associates. August, 1946. P. 76.

LENDING POLICIES FOR A COUNTRY BANK. By T. Allen Glenn, Jr. Bulletin Robert Morris Associates. August, 1946. P. 92.

LOANS ON PRODUCING OIL PROPERTIES. By W. B. Duke. Bulletin Robert Morris Associates. August, 1946. P. 86.

PAR CLEARANCE

Articles

22 FORMER NON-PAR BANKERS TELL ADVANTAGES OF PAR PAYMENT. Bankers Monthly. August, 1946. P. 390.

PERSONNEL

Articles

EXPERIENCES IN DEVELOPING EFFECTIVE PERSONNEL PROGRAMS. By E. L. Stucker. Bankers Monthly. August, 1946. P. 371.

SALARY ADMINISTRATION. By Edward N. Hay. National Auditgram. August, 1946. P. 10.

Books

LINCOLN'S INCENTIVE SYSTEM. By James F. Lincoln. New York: McGraw Hil Book Company. 1946. Pp. 192. $2. Describes the amazing plan which has proven itself beyond a doubt within the Lincoln Electric Company—largest manufacturers of arc-welding machines and electrodes in the world. In this book, James F. Lincoln shows what the incentive philosophy actually *is* behind his astounding business success.

Pamphlets

THE JOB HUNTER'S HANDBOOK. By Martin W. Schaul. New York: Prentice-Hall. 1946. Pp. 58. $1. Tells where and how to find a job in your city. Although designed primarily for distribution by organizations and institutions over their own imprints, single copies are available.

PUBLIC RELATIONS

Articles

CANDID COMMENTS ON BANK COURTESY. By Mary A. Ralston. Burroughs Clearing House. August, 1946. P. 20.

SAFE DEPOSIT

Articles

AUDIT AND CONTROL OF SAFE DEPOSIT DEPARTMENTS. By Philip C. Rouleau. National Auditgram. August, 1946. P. 17.

SATURDAY CLOSING

Articles

SATURDAY CLOSING FOR BANKS MEETS MIXED REACTION, SURVEY INDICATES. Mid-Continent Banker. August, 1946. P. 11.

SAVINGS DEPARTMENT

Articles

WINDOW-POSTING MACHINES IMPROVE SAVINGS DEPARTMENT OPERATION. By L. H. Rahn. Mid-Continent Banker. August, 1946. P. 22.

SERVICE CHARGES

Articles

RICHMOND BANKS SAVE TIME—IMPROVE PUBLIC RELATIONS—SIMPLIFY ANALYSIS WORK BY CLASSIFYING ACCOUNTS. By Warren M. Goddard. Bankers Monthly. August, 1946. P. 377.

SERVICE WITH A SMILE—AND A SERVICE CHARGE—BOTH ARE NEEDED. By C. W. Fishbaugh. Mid-Western Banker. August, 1946. P. 18.

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DURING the war, millions of wage earners set aside billions of dollars for War Bonds through *weekly pay deductions* under the *Payroll Savings Plan.*

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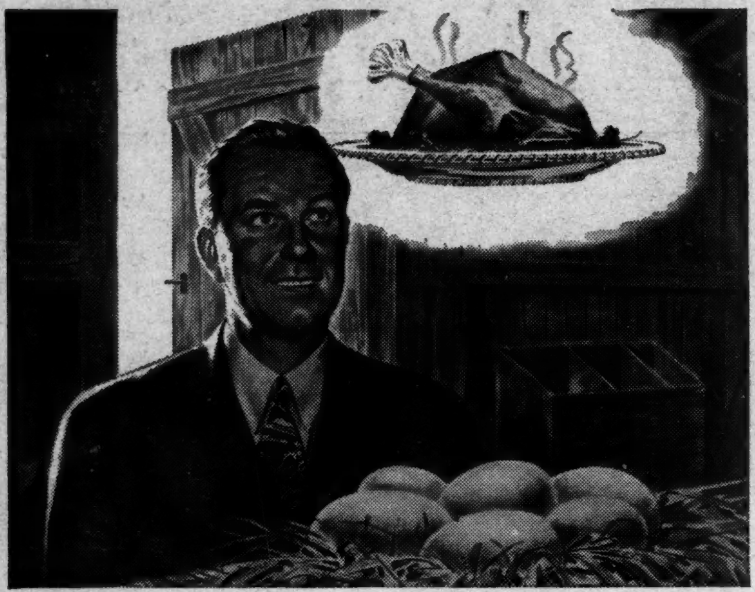

Sometimes you can break a good rule!

It's usually a wise rule not to plan a chicken dinner before the eggs are hatched.

But not always!

If the "chicken dinner" represents your future, and the "eggs" are financial nest eggs—go ahead and plan!

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SAVE THE EASY WAY... BUY YOUR BONDS THROUGH PAYROLL SAVINGS

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